

2d ed.

St. Brit. Court of King's bench

11

A

REPORT  
Of Divers  
CASES  
IN

Pleas of the Crown,  
Adjudged and Determined;

In the Reign of the late

King Charles II.

With Directions for JUSTICES of the  
PEACE and Others.

Collected

By Sir John Kelyng, K<sup>nt</sup>.

Late LORD CHIEF JUSTICE of His MAJESTY'S  
COURT of KING'S BENCH.

From the Original Manuscript, under his own Hand.

To which are added, The Reports of three Modern Cases, Viz.  
*Armstrong* and *Lisle*; The KING and *Plumer*; The  
QUEEN and *Mawgridge*.

The Second Edition.

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Black Swan without *Temple-Bar*. MDCCXXXIX.

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# REPORT OF DECISIONS IN CASES

Pleas of the Crown  
Adjudged and Determined  
In the Reign of the late

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With Directions for Justices of the  
Peace and Others.

By Sir John Kilday, K.  
Late Lord Chief Justice of the King's Bench  
Court of King's Bench.

From the Original Manuscript, under his own Hand  
To which are added, The Reports of the Judges of the  
Court of King's Bench, and the Court of Common Pleas,  
GUTHRIE and MACKENZIE.

The Second Edition.  
In the Year 1707.  
Printed by H. and T. A. in London, at the Sign of the  
Three Kings, in the Strand, near the Temple Church.  
And by J. Smith in Westminster, and D. Brown in  
Black Swan without Temple-Bar. MDCCLXX.



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# READER.

**T**Here can be nothing more said to recommend these Cases to your Perusal, than to assure you they are the Collection of Sir John Kelyng, Kt. sometime Chief Justice of the Court of King's Bench; The Manuscript whereof under his own Hand was in the Custody of his Grandson and Heir; Copies whereof were Dispersed in several Hands, which might hereafter be Published to the Injury of the Author, and disadvantage of the Publick. There are Two Quæres inserted in the Margent by the Publisher<sup>†</sup>; The one is Page 13, the other in Page 41, which may be fit to be considered by the Learned.

<sup>†</sup> Lord Chief Just. Holt. Foster 269

The Three Modern Cases are conceived to be of some Use, therefore are thought fit to be Published; And if they shall be found to be of any Benefit, its what is desired by the Publisher thereof.

Farewel.

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the Publisher's Interest.

Printed

Quare

1

**ORDERS and DIRECTIONS** to be observed by  
the Justices of the Peace and others, at  
the Sessions in the Old Baily, for Lon-  
don and Middlesex, made 16 Car. 2. by  
Sir Robert Hyde, Chief Justice of the  
Kings Bench; Sir Orlando Bridgeman,  
Chief Justice of the Common Pleas; Sir  
Thomas Twisden, one of the Judges of  
the Kings Bench, Sir Thomas Tyril,  
one of the Judges of the Common Pleas, and  
Sir John Kelyng, one other of the Judges  
of the Kings Bench, and signed by them  
all, and Read in open Court, and order'd  
to be filed by the Clerk, that all Justices  
might take Copies by them if they please: For  
that they shall not for the Future pretend  
Ignorance of their Duty.

I. **T**HAT all Recognizances and Bail-  
ments taken by any Justice of the  
Peace, be certified into the Court the  
first day of every Sessions before Noon, for that  
they being kept longer out, it often happens that

B

Felons



Felons and other Offenders escape, the Prosecutors Witnesses, and Parties being wearied out with Delays and Attendance, beside many other great Mischiefs; and that the Justices of Peace who are faulty herein be fined by the Justices of Goal Delivery, according to the *Stat. of 1 & 2 Ph. & Ma. cap. 13.* and *2 & 3 Ph. & Ma. cap. 10.*

2. If the Offenders appear not upon their Recognizances the first Day, the Default to be Recorded, and the Recognizance to be forfeited; Nevertheless Processes or Warrants, as the Case shall require, to go out against them and their Bail; so likewise as to those who are bound to give in Evidence, that if possible the Business be not deferr'd to another Sessions, in which time commonly the Prosecutors and Witnesses are taken off, and the Matters compounded.

3. That all Justices of the Peace do take Examinations both of the Felons without Oath, and the Informers and Witnesses against them upon Oath in Writing before they commit the Offenders to the Goal, and certify the same the first Day of the Sessions, that they may be ready upon the Tryal of the Felons, or else to be fined according to the Statutes of *Ph. & Mary* before mentioned.

4. That all Prisoners for Treason and Felony be according to Law, sent to the Common Goal, which is *Newgate*, and not to the *New-Prison*. It being found by Experience that they are often set at Liberty there without Tryal.

5. That

5. That no Prisoner for Felony be discharged during the Interval of Sessions, unless it be upon good Bail taken, the Warrant or Mittimus to the Goaler to keep them until they are delivered according to Law, nor any Bail or Recognizance for Appearance to be given up or withdrawn by the Justice of Peace after the same is taken, but be returned and certified to the Sessions or Goal Delivery, the Offender whether Justice of Peace or Goaler to be severely proceeded against.

6. If any Justice of the Peace shall take Bail where he ought not, or wittingly or willingly take insufficient Bail, and the Party appear not, the said Justice not only to be proceeded against according to Law, but likewise to be complained of to the Lord Chancellor, that he may be turned out of his Commission.

7. That no Copies of any Indictment for Felony be given without special Order upon Motion made in open Court, at the general Goal Delivery upon Motion, for the late frequency of Actions against Prosecutors (which cannot be without Copies of the Indictments) deterreth People from Prosecuting for the King upon Just Occasions.

8. That the Goalers make more perfect Kalendars than of late they have done, according to the *Stat. H. 7. cap. 3.* and insert not only Persons in their Custody, but also such as have been in their Custody since the last Sessions, and Bailed or Delivered out, and by whom.

9. That

9. That if any *Habeas Corpus* come to receive a Prisoner from another Goal, the Goaler to take notice of the Offence for which he stood Committed at the other Goal, and to inform the Court, that if he shall happen to be acquitted, or have his Clergy, he may yet be remanded to the former Goal, if there be Cause.

10. If any *Habeas Corpus* come to the Goalers to remove a Prisoner, that with the Prisoner they also certifie the Cause for which he stood there committed. It being found by Experience, that by Colour of *Habeas Corpus* to receive and remove Prisoners, many notorious Offenders do escape.

11. That no Prisoner convicted for any Felony, for which he cannot have his Clergy (unless it be Women, in such Cases, where if had they been Men, they might have had Clergy) be Reprieved, but in open Sessions, and not otherwise, without the King's expresse Warrant, and not by Order of any the Justices of Goal Delivery, or *Oyer and Terminer*.

12. That such Prisoners as are Reprieved, with intent to be transported, be not sent away as perpetual Slaves, but upon Indentures betwixt them and particular Masters, to serve in our *English* Plantations for seven Years, and the three last Years thereof, to have Wages, that they may have a Stock when their Time is expired; and that an Account be given thereof, and by whom they are sent, and of their Arrivals.

13. For



13. For that it hath frequently happened of late, that some have been killed upon Duels, others upon suddain Quarrels in the Streets. And the Inhabitants neglect to apprehend the Murderers, or to make Huy and Cry after them, and so the Persons not only escape, but no direct Knowledge can be given who they are. And by the Law, If any Man be slain in the Day, and the Fellow not taken, the Township ought to be amerced; That therefore when any such Case appeareth at *Newgate*, as it too often doth, upon the acquittal of Persons apprehended upon Suspicion, that both the Coroner, as also the Secondaries at *Newgate* be required to attend the Judges of the King's Bench, that information may be put in that Court against the Townships for the escape, and followed *pro Rege*; And at the next Sessions at *Newgate*, give an Account what is done.

*Ro. Hyde,*  
*Orl. Bridgeman,*  
*Tho. Twisden,*  
*Tho. Tyrell,*  
*John Kelyng,*



# High-Treason.

**A**fter the happy Restauration of King Charles the Second, to his Right of the Crown of England, which was in May, 1660. several Persons who were apprehended for the Murder of his Father, were now to be indicted for that horrid Treason, and in order thereto, the then Judges, who, at that time were only the Lord Bridgeman, then Chief Baron of the Exchequer; Justice Foster, and Justice Hyde, then Judges of the Common Pleas, and Justice Mallett, then Judge of the King's Bench, met several times, at Serjeants-Inn in Fleetstreet, with Sir Jeffry Palmer, the King's Attorney, and Sir Heneage Finch, the King's Solicitor, Sir Edward Turner, Attorney to the Duke of York; Mr. Wadham Windham, of Lincoln's Inn, and my self, being by special Order to attend that service as Counsel for the King, there being then no King's Serjeant, but Serjeant Glanvill, Serjeant to the late King, who was then Old, and Infirm: And in order to the proceeding in that great Affair, I was appointed to make as many Queries as I thought fit to be advised upon; which, I did accordingly, and upon them, these Things following were resolved.

1. That it was better to try those Traitors at the Sessions at Newgate, by Commission of Goal-delivery, then only by special Commission of Oyer and Terminer; because then they might be proceeded against more speedily, and arraigned and tryed immediately, by the Commission of Goal delivery, and Cases might be immediately returned at the Goal-delivery. And accordingly Writs were ordered to be made and sent to the Lieutenant of the Tower, in whose Custody the Prisoners then were to be.

liber



liber them to the Sheriffs of London, and Writs to the Sheriffs of London to receive them, that they might be in Newgate, which was done accordingly. And because, by an Act of Parliament or Convention which sat at the King's coming in English Proceedings were continued until Michaelmas now close at hand, but not yet come; Therefore those Writs to the Lieutenant of the Tower and Sheriff of London, were ordered to be in English.

2. It was agreed that all the Prisoners should be arraigned the first day before any of them were brought to Tryal, and the next day to proceed to Tryal with one or more of them together, as should be thought fit upon the place.

King's Council  
may privately  
give Evidence to  
the Grand Jury.

3. It was resolved that any of the King's Council might privately manage the Evidence to the Grand Inquest, in order to the finding of the Bill of Indictment, and agreed that it should be done privately; it being usual in all Cases, that the Prosecutors upon Indictments are admitted to manage the Evidence for finding the Bill; and the King's Council are the only Prosecutors in the King's Case, for he cannot prosecute in Person.

Compassing the  
King's Death in  
the Treason.

4. It was resolved that the Indictments should be for compassing the Death of the late King (the very compassing and imagining of the King's Death, being the Treason within the Stat. 25 Ed. 3.) and then that we might lay as many Overt Acts as we would, to prove the compassing of his Death: But it was agreed, the actual Murder of the King should be precisely laid in the Indictment, with the special Circumstances as it was done, and should be made use of as one of the Overt Acts, to prove the compassing of his Death.

Overt Act not  
laid in Indict-  
ment, may be  
given in Evi-  
dence.

This is altered  
by the Statute of  
7 W. 3. c. 3. p. 11.

5. It was resolved that if any one Overt Act tending to the compassing the King's Death, be laid in the Indictment. That then any other Act which tends to the compassing of the King's Death, may be given in Evidence together with that which is laid in the Indictment.

See. Stat. 6. E. 9. 10. 22. 24. 5. 6.

6. It

6. It was resolved that there need not be two Witnesses to prove every Overt Act, tending to the compassing of the King's Death. But one Witness to prove one Overt Act tending to the compassing of the King's Death, and another Witness to prove another Act tending to the same end, are sufficient; for compassing the King's Death is Treason. And then if two several Witnesses prove two several Acts tending to the compassing the King's Death, the Treason is proved by two Witnesses as the Law in Case of Treason requireth.

7. It was resolved that if several Persons be indicted together in one Indictment for one Crime, in case some of them be found guilty by one Jury, and afterwards some of the same Jury be returned for tryal of others in the same Indictment; it is no Challenge for those Prisoners to say, that those Jurors have already given their Verdict, and found others guilty who are indicted in the same Indictment for the same Offence; for though they are all indicted in the same Indictment for the same Offence, yet in the Law it is a several Indictment against every one of them, and the Crime is several, and one may be guilty and not another, and the Jury are to give their Verdict upon particular Evidence against every several Person, and therefore the finding one guilty, is no Argument or Presumption that those Jurors will find another guilty.

Finding others guilty in the same Indictment, no cause of Challenge.

8. It was resolved that if several Prisoners be put up on one Jury, and they challenge peremptorily, and sever in their Challenges, that then he who is challenged by one, is to be drawn against all, because the Panel being joint, one Juror cannot be drawn against one and serve for another. But in such case it was agreed the Panel might be severed, and that the same Jury may be returned betwixt the King and every one of the Prisoners, and then they are to be tryed severally, and there the Challenge of one Prisoner is no Challenge to disable the Juror so challenged against another Prisoner. And the Case of Dr. Ellis's Servant, Plo. Com. 100, 101. was agreed to be good Law, as to the severing of the Panels in that case; and accordingly, afterwards upon the tryal of Harrison and others, who chal-

Severing of the Pannel.

lenged peremptorily, and severed in their Challenges, particular Jurors, the Panels were severed.

Ironsto be taken  
from Prisoners  
at their Trial.

9. It was resolved that when Prisoners come to the Bar to be tryed, their Irons ought to be taken off, so that they be not in any Torture while they make their defence, be their Crime never so great. And accordingly upon the Arraignment and Cappel of Hewlet and others, who were brought in Irons, the Court commanded their Irons to be taken off.

*Quidam ignotus.*

10. It being agreed that the Murder of the King should be specially found, with the Circumstances in the Indictment. And it being not known who did that villainous Act; it was resolved, that it should be laid that *Quidam ignotus*, with a Cloak on his face did the Act; and that was well enough, and the other Persons be laid to be present, aiding and assisting therunto.

No Year laid for  
one Act.

11. The compassing the King's Death, being agreed to be laid in the Indictment, to be 29 Jan. 24 Car. Primi, and the Murder on the 30th of the same Jan. It was questioned in which King's Reign the 30th Jan. should be laid to be, whether, in the Reign of King Charles the first, or King Charles the second, and the Question grew, because there is no Fraction of a Day, and all the Acts which tended to the King's Murder, until his Head was actually severed from his Body, were in the time of his own Reign, and after his Death in the Reign of King Charles the second. And though it was agreed by all, except Justice Mallett, that one and the same day might in several respects, and as to several Acts, be said to be entirely in two Kings Reigns, so that in some respects the whole day may be ascribed to one, and in other respects, the whole day ascribed to the other, according to the Truth in the matters of Fact which were acted, either in the Life, or after the Death of the first King, yet because Justice Mallett was earnest that the whole day was to be ascribed to King Charles the second, therefore it was agreed, that in that place, no Year of any King should be named, but that the compassing of the King's Death should be laid on the 29th Jan. 24 Car. Primi, and the other Acts tending to his Murder, and the Murder it self laid



last to be Tricesima Mensis ejusdem Januarii, without naming any year of any King, which was agreed to be certain enough.

12. It being agreed that the Indictment should be for compassing the King's Death, and one of the Overt Acts to be the actual Murder of the King: It was resolved the Indictment should conclude *contra pacem nuper Domini Regis Coron' & dignitat' suas, Nec non contra pacem Domini Regis nunc Coron' & dignitat' suas.* *Contra pacem of 2 Kings.*

13. The Question was put, whether the Recorder of London should give the Charge to the grand Inquest at Hick's-Hall, where the Indictment was to be found, the Fact being in Middlesex; And also whether Judgment at the Sessions-house, where the Prisoners were to be tryed, should be there given by the Recorder, or whether the Charge and the Judgment should be given by the Chief Judge: And it was agreed that both should be given by the Chief Judge. And accordingly this was done by my Lord Bridgeman, and he gave the Charge only relating to enquire of the Murderers of the late King, without mixing any other matter then to be enquired of: And after the Charge, one Indictment was prefer'd against all the King's Murderers, who were in Prison, and also against several others who were not then apprehended, but agreed they should be attainted by an Outlawry upon the same Indictment. And the same day the Indictment was found, and the next day delivered at the Goal-delivery, in the Sessions-house in the Old Baily, which day all the Prisoners were arraigned, and pleaded not guilty, but afterward some of them withdrew their Plea, and confess'd the Indictment, viz.

*Chief Judge giveth Judgment in Treason.*

*The day was Tuesday, 9th of Octo. 12 Car. 2d.*

14. Sir Hardres Waller, and Geo. Fleetwood, which was accordingly recorded by the Court, and agreed by all the Judges, that it might be done, altho' the Clerk had recorded their Plea of not Guilty; for the Entry is, that such a one postea, or relicta verificatione cognovit Indictamentum. *Confession after not guilty pleaded.*

15. Memorandum, That upon the arraignment of Henry Martyn, his Name being so written in the Indictment, *Variance in Letters of Sirname.*

ment, he said his Name was Marten, and not Martyn; but the Court agreed that he being known by that Name of Martyn, that was well enough in an Indictment, tho' it be not spelled directly as he spelleth it.

Memorandum, That the Indictment was in Latin, it being preferred after Michaelmas, until which time, all English Proceedings were allowed by that Convention which was sitting when the King was restored.

And after, all the Prisoners who pleaded not Guilty, were convicted upon full Evidence, and had Judgment of High-Treason.

Commissioners  
for Trial, give  
evidence as wit-  
nesses.

Memorandum, That Secretary Morris and Mr. Annesley, President of the Council, were both in Commission for the Tryal of the Prisoners, and sat upon the Bench, but there being occasion to make use of their Testimony against Hacker, one of the Prisoners, they both came off from the Bench, and were sworn, and gave Evidence, and did not go up to the Bench again during that Man's Tryal; and agree'd by the Court they were good Witnesses, tho' in Commission, and might be made use of.

16. Upon the Tryal of Coke of Grays-Inn, who was of Council against the King, and delivered in the Charge against the King in the Traiterous Court called the High Court of Justice; he objected that he did not draw up the Charge; but he only acted as a Counsellor, and did only speak Words to have the Charge read, and demanded Judgment against the King; and he said words did not make Treason.

Acting as Coun-  
cel, not excuse  
for Treason.

17. It was resolved by the Court, that if a Paper containing treasonable matter, be Indicted by another, yet being known by Coke to contain treasonable matter, and being delivered by him as a Charge against the King to take away his Life, this is an Overt Act to prove that he compassed the King's Death, which is the Treason he is Indicted for.

Approbation in  
High-Treason  
maketh guilty.

18. And in case of High Treason, If any one do any thing by which he sheweth his liking and Approbation to the Traiterous Design, this is in him High-Treason: For all are Principals in High Treason, who contribute towards it by Action or Approbation.

19. And

19. And it was resolved that tho' in case a Man be indicted only for Words, that is not High-Treason. But if a Man be indicted for compassing the King's Death, there Words may be laid as an Overt Act to prove that he compassed the Death of the King; as it was in the Case of Crohagan, who being beyond Sea, spake these Words, I will kill the King, if I can come at him; and afterwards he came to England, and was taken and indicted for compassing the King's Death, and these Words laid as an Overt Act, and proved, and he had Judgment of High-Treason. And Co. Pl. Cor. 14. agreeth, that words set down in writing, are an Overt Act to prove the compassing the King's Death, as in the Case of Cardinal Poole there cited, and words spoken are the same thing if they be proved; and words are the natural way for a man whereby to express the imagination of the Heart. If it be any way declared that a man imagineth the King's Death, that is the Treason within the Stat. 25 Edw. 3.

Words are an Overt Act to prove Treason.

See *Frost v. L. C. 148. p. 202, 3.*  
Cro. Car. p. 332.

Though Co. Pl. Cor. 14. be against this Opinion, yet it was agreed that was no Law.

Yet, *Quere*, because of the different Opinions; but Words will explain the meaning of an Act.

Acting as Soldier by command of his Superiour, no excuse for Treason. That otherwise was indifferent.

20. Memorandum, That upon the Tryal of one Axtell, a Soldier, who commanded the Guards at the King's Tryal, and at his Murder; he justified that all he did was as a Soldier, by the command of his superiour Officer, whom he must obey or die. It was resolved that was no excuse, for his Superiour was a Traitor, and all that joyned with him in that Act were Traitors, and did by that approve the Treason; and where the command is Traitorous, there the Obedience to that Command is also Traitorous.

Memorandum, That in Easter Term, 14 Car. 2d. John Barksted, John Okey, and Miles Corbet, three of those Persons who presumed to Judge the late King to death were apprehended, they then being outlawed upon the former Indictment; and they were brought to the King's Bench Bar, and demanded severally what they could say why Execution should not be awarded against them (after the Indictment was first read to them) and they pleaded they were not the same Persons, and thereupon the same day a Jury was presently returned, the Court sitting; and they found they were the same Persons, and so Execution awarded, which was after done accordingly. Note, So is the Report in the Manuscript, but the Record is of an Attainder by Act of Parliament; but there might be an Outlawry also.

Execution awarded upon attainder by Outlawry.

Immediate Tryal upon Plea that the Prisoners were not the same Persons.



Sir Hen. Vane's  
Case.

The Acts laid  
were Acts done  
after the death  
of K.Ch. the first,  
and before the  
actual restoring  
of K.Ch. the se-  
cond.

Memorandum, That in Trinity Term, 14 Car. 2. Sir Hen. Vane was indicted at the King's Bench for compassing the Death of King Charles the 1<sup>st</sup>, and intending to change the Kingly Government of this Nation; and the Overt Acts which were laid, were, that he with divers other unknown Persons did meet and consult of the means to destroy the King and Government; and did take upon him the Government of the Forces of this Nation by Sea and Land, and appointed Colonels, Captains, and Officers, and the sooner to effect his wicked Design, did actually in the County of Middlesex raise War. And upon his Tryal, he justified that what he did was by the Authority of Parliament, and that the King was then out of Possession of the Kingdom; and the Parliament was the only Power regnant; and therefore, no Treason could be committed against the King: And he objected, that a levying War in Surrey could not be given in Evidence to a Jury in Middlesex; and he desired to offer a Bill of Exception, because these things were overruled by the Court; and in this Case these Points were resolved of by the Court.

Long Parlia-  
ment dissolved  
by death of  
the King.

1. That by the Death of King Charles the 1<sup>st</sup>, that long Parliament was actually determined; notwithstanding the Acts of Parliament that it should not be dissolved, but by consent of both Houses. For every Parliament is called to consult with the Person of the King who calleth it; and therefore upon his Death it is determined; for they can no longer consult with him for which end they were call'd. And a Case was cited to be resolved, that, where, in the 13 of Q. Eliz. an Act of Parliament was made, that a Commission of Sewers should continue for Ten Years, unless the same be determined or repealed by any new Commission, or by Superseas, King James granted such a Commission and died within that time; Adjudged, that the Commission was determined; for all Commissions are determined by the death of the King who grants them, and this point of the actual determination of that Parliament by the death of King Charles the 1<sup>st</sup>, was before that time resolved by all the Judges of England, as my Lord Bridgeman told me. But note, there were no special Words to continue the Parliament upon the King's Death.

2. It

2. It was resolved, that tho' King Charles the 2d. was <sup>Traitors keep</sup> de facto kept out of the exercise of the Kingly Office by <sup>out the King</sup> Traitors and Rebels; yet he was King both de facto, & <sup>yet Traitors</sup> de Jure. And all the Acts which were done to the keeping <sup>gainst him</sup> him out were High-Treason.

3. It was resolved that the very Consultation and Advising together of the means to destroy the King and his Government, was an Overt Act to prove the compassing of the King's Death.

Consulting to destroy the King is an Overt Act to prove the Treason of compassing his death.

4. It was resolved that in this Case, the Treason laid in the Indictment being the compassing of the King's Death, which was in the County of Middlesex, and the levying War being laid only as one of the Overt Acts to prove the compassing of the King's Death, tho' this levying of War be laid in the Indictment to be in Middlesex, yet a War levied by him in Surry, might be given in evidence; for being not laid as the Treason, but only as the Overt Act to prove the compassing, it is a transitory thing which may be proved in another County. But if an Indictment be for levying War, and that made the Treason for which the Party is indicted, in that Case it is local, and must be laid in the County where in truth it was.

5. It was resolved, that the Stat. of W. 2. Cap. 31. No Bill of exception which giveth the Bill of exception, extends only to criminal Causes, and not to criminal; the Words of the Stat. are, Cum aliquis implacitatur coram aliquibus Justiciariis, &c. And the Intention never was to give such Persons liberty to put in Bills of Exception, for then there would be no Exceals of that nature ever dispatched in any time, neither here nor in the Circuits, if every frivolous Exception which a Prisoner would make, should be drawn up in a Bill of Exception; besides, the Court is always so far of Council with the Prisoner as to see that he hath right, and if they find any thing doubtful, they of themselves will take time to advise: But the words of the Stat. are plain, as the Court agreed, as to this point.



Treason found  
by the Jury to  
be several Years  
before the time  
in the Indict-  
ment.

6. Altho' the Treason of compassing the King's Death was laid in the Indictment to be the 30th of May, 11 Car. 2. yet upon the evidence it appeared, that Sir Hen. Vane, the very day the late King was murdered, did sit in Council for the ordering of the Forces of the Nation against the King that now is, and so continued on all along until a little before the King's coming in; It was resolved that the day laid in the Indictment is not material, and the Jury are not bound to find him guilty that day, but may find the Treason to be as it was in truth either before or after the time laid in the Indictment; as it is resolved in Syers Case, Co. Pl. Coron' 230. And accordingly in this Case the Jury found Sir H. Vane guilty of the Treason in the Indictment the 30th of January, 1 Car. 2. which was from the very day the late King was murdered, and so all his forfeitures relate to that time to avoid all conveyances and settlements made by him.

More than 24  
may be returned  
for Tryal of cri-  
minal Causes.

7. Memorandum, That in this Case of Sir H. Vane, he being to be tryed at the King's Bench Bar, before he came to his Tryal, it was considered by myself, and others then of the King's Council, that it was possible that he might challenge peremptorily, and so defeat his Tryal at that day, at which it was appointed, if there should be only 24 Jurors returned.

And thereupon, search was made in the Crown Office, and it did appear, that in Tryals on the Crown side for Criminals, the Sheriff might be commanded to return any number the Court pleased; and accordingly, at his Tryal the Sheriff returned about 60 of the Jury; and at common Law in Civil Causes, it seems the Sheriff might have returned above 24 if he pleased; And therefore by the Stat. W. 2. Cap. 38. It is recited, that where- as the Sheriffs were used to summon an unreasonable multitude of Jurors to the grievance of the People; it is ordained that from thenceforth, in one Assize, no more shall be summoned than 24, which Stat. extends not to Jurors, returned for tryal of criminal Persons; the like may be done upon a Commission of Oyer and Terminer.



Memorandum, That at the Sessions at Newgate, 11. Dec. 14 Car. 2. Tho. Tong, Geo. Philips, Francis Stubbs, *Tong's Case.* and several others, were indicted for High-Treason, for compassing the King's Death, and the Overt Acts laid in the Indictment; were assembling themselves together, and consulting and agreeing to destroy the King, *Ac ad eadem prodiones perimplendas*, the consulting to seize Whitehall, where the King was Resident.

1. And in this case, It was resolved by all the Judges, Consulting is an overt Act. that the meeting together of Persons, and consulting to destroy the King, was of it self an overt Act to prove the compassing the King's death.

2. It was resolved that where a person knowing of the design does meet with them, and hear them discourse of their traitorous Designs, and say or act nothing; This is High-Treason in that party, for it is more than a bare Concealment, which is Misprision, because it sheweth his liking, and approving of their Design; but if a Person not knowing of their design before, come into their Company, and hear their Discourses, and say nothing, and never meet with them again at their Consultations, that concealment is only Misprision of High-Treason. But if he after meet with them again, and hear their Consultations, and then conceal it, this is High-Treason. For it sheweth a liking, and an approving of their design; and so was Sir Everard Digby's Case, who in the Powder Treason met with the Traitors, and heard their design, but upon the evidence it was not proved that he said any thing, or acted any thing, and he had Judgment of High-Treason.

3. It was resolved that some of those Persons who are equally culpable with the rest, may be made use of as Witnesses against their Fellows, and they are lawful Accusers, or lawful Witnesses within the Stat. 1 Ed. 6. 12. 5 & 6 Ed. 6. Cap. 11. & 1 Mar. 1. and accordingly, at the Tryal of these men, some of their Partners in the Treason were made use of against the rest; for lawful Witnesses within those Statutes are such as the Law alloweth; and the Law alloweth every one to be a Witness who is not convicted, or made infamous for some Crime. And if it were

not so, all Treasons would be safe; and it would be impossible for one who conspires with never so many others to make a discovery to any purpose.

But the L. C. Baron Hales said, that if one of these culpable Persons be promised his Pardon, on condition to give evidence against the rest, that disableth him to be a Witness against the others, because he is obliged by saving his Life to be a Witness, so that he takes a difference where the Promise of Pardon is to him for disclosing the Treason, and where it is for giving of evidence. But some of the other Judges did not think the promise of Pardon, if he gave Evidence, did disable him, but they all advised that no such promise should be made, or any threatnings used to them in case they did not give full evidence.

Diversity of Opinions.

There needs 2 witnesses for Treason at this day, Stat. 1 & 2 P. & M. c. 10. See afterwards in this Book, for more of this Point. Same Witnesses to find the Indictment, and at Tryal.

4. Altho' the Lord Chief Justice Bridgeman, and some others of the Judges were of Opinion that those words of two Witnesses in case of High-Treason, were repealed by the Stat. 1 & 2 Ph. & M. cap. 10. which enacts that all Treasals for Treason be according to the course of the Common Law: And at common Law, one Witness is sufficient to a Jury, tho' Co. Pl. Cor. is against this Opinion, yet they all agreed that if that Law for two Witnesses be in force, yet the same two Witnesses who are to the Indictment, may be also the Witnesses at the Tryal: And the Law doth not require two to the finding the Indictment, and two others at the Tryal.

Confession upon examination proved by two Witnesses good evidence of it self.

*See Feft. C. L. p. 269, 1, 2.*

5. They all agreed that if a Conspirator be examined before a Privy Counsellor or a Justice of Peace, and upon his Examination without Torture confess the Treason; If after at his Tryal he deny it, and two Witnesses to prove that Confession, are good Evidence against him that made that Confession, at his Examination aforesaid; and in that case there needs no Witnesses to prove him guilty of the Treason; for that Confession puts it out of the Statute which requires two Witnesses to prove the Treason, unless the Party shall without Torture confess the same; and the Confession there spoken of, is not meant a Confession before the Judges at his Tryal, but a Confession upon his Examination: But such Confession so proved is only evidence against the Party himself who made the Confession, but cannot be made use of as evidence



dence against any others whom on his Examination he confessed to be in the Treason.

6. They all agreed that such a Confession upon Examination before a Privy Councillor, tho' he be not a Justice of Peace, is a Confession within the meaning of the Statute; and the rather, as the Lord Bridgeman said, because Justices of the Peace were not enabled to take examination before the Stat. 1 & 2 P. & M. cap. 13.

Confession before a Privy Councillor, is a Confession within the Stat. *Jeff. C. L. 261.*

Memorandum, That a week before Christmas, 15 Car. 2. my Brother Turner, my self, and my Brother Archer, were appointed by the King to go to York, for the Tryal of several Persons there taken for conspiring to levy War against the King, and some of them did actually meet in Farncliffe-wood near unto Leeds, with Horses, Arms, and Foot Soldiers. And thereupon there was a meeting by the two Chief Justices, my Lord Hyde, and my Lord Bridgeman; and we three with Sir Jeff. Palmer the King's Attorney, and Sir Heneage Finch the King's Solicitor, did thereupon debate several things which were agreed by us all, viz.

The North rising, 15 Car. 2.

1. That if several Persons do agree to levy War, and some of them do actually appear in Arms, and others do not, this is an actual levying of War in all of them, as well those who were not in Arms, as those who were, if they be proved to be of the Plot with them who did actually appear in Arms; for there are no Accessories in Treason, and therefore all that are in the Conspiracy are equally guilty.

Several Persons agree to raise War, and some appear actually in Arms.

In the next place, we being informed that tho' there was a Conspiracy to raise War in the North Riding of Yorkshire, as well as the West Riding where some did actually appear in Arms, yet it could not be proved that those in the North Riding did agree to the rising that was in the West Riding, or that they knew any thing of it, and so would not be within the first Resolution.

And thereupon the new Statute made the 13 Car. 2. for the safety of the King's Person, which maketh the Conspiracy King's Person.

New Statute for Safety of the King's Person.



spiracy compassing and intending to raise War to be High Treason, in case they express or declare such Imaginations, Intentions, &c. by Printing, Writing, Preaching, or malicious, and advised speaking; and upon that Act it was agreed,

2. That if one be indicted for imagining or intending to levy War, there must be some Overt Act laid in the Indictment to prove such Imagination, as there is at this day in Indictments for compassing and imagining the King's Death; and it was conceived that no Overt Act could be laid to make it Treason within that Statute, but one of those which are named in that Statute. viz. Printing, Writing, Preaching, or Malicious, and advised speaking, and we were informed that no Printing, Writing, or Preaching could be proved, and it would be impossible to lay such words as could be fastened on them, and to prove that they spoke them; but in general we were informed, that their consulting and meeting together, and agreeing to raise War would be proved; and thereupon it was resolved that the best and safest way to proceed against them, was to indict them for compassing and imagining the death of the King, and to lay the meeting, consulting, and agreeing to levy War, as one overt Act, and the actual levying War as another overt Act, and so proceed upon the Stat. 25 Ed. 3.

Consulting to  
levy War, is an  
overt Act to  
prove compass-  
ing the King's  
Death.

3. For it was resolved, and agreed by all now as it was before ~~it was~~ in Tong's Case, and Sir H. Vane's Case, that the meeting and consulting to levy War is an overt Act to prove the compassing the King's Death, within the Statute of 25 Ed. 3. Altho' the consulting to levy War is not actual levying within the Statute, and so cannot be indicted thereupon, for that Treason of levying War. Yet if they be indicted for the Treason of compassing and imagining the King's Death, that consulting to levy War is an Overt Act to prove that Treason, altho' Co. Pl. Cor. 14. delivers an Opinion against this.

4. It was resolved, that if persons do actually levy Actual War an War, so that they may be indicted for the Treason of le- Overt Act to vying of War, within the Stat. 25 Ed. 3. Yet they may be prove the com- indicted for compassing the King's Death, and their actual passing the levying of War may be laid as an Overt Act to prove King's Death. the compassing the King's Death: And tho' Co. Pl. Cor. 14. be of another Opinion, yet that is no Law: For he expressly contradicts himself, for he reports the Case of the Lord Cobham, 1 Jacobi 1.

And the Case of the Earl of Essex, 43 Eliz. where it was resolved by all the Judges, That the gathering of Men together to compel the King to yield to certain Demands, or to remove ill Councillors, was an Overt Act to prove the compassing of the King's Death, for which they were indicted, so Co. Pl. Cor. 12. accords, and in the same Book, Fo. 14. &c. agreeth, That if a Subject conspire with a Foreign Prince beyond Seas to invade the Realm, and prepare for the same by some Overt Act, this is a sufficient Overt Act to prove him guilty of Treason in compassing the King's Death. And it was observed that in these Posthumous Works of Sir E. Coke, of the Pleas of the Crown, and Jurisdiction of Courts, many great Errors were published, and in particular in his discourse of Treason, and in the Treatise of Parliaments.

Errors in Co. Pl. Jurisdiction of Courts, of Treason, and of Parliaments.

5. It was agreed that the bare knowledge of Treason, and the concealment of it was not High Treason, but Misprision of Misprision of Treason. But in Case any thing be proved Treason; what, upon Evidence, that the Party liked or approved of it, and what not. then it is High Treason; or if the Party knew of the Design, and after such knowledge, met with the Conspirators at their Consultation; or if he went knowingly to their Consultations several times, this is evidence of his approbation of the Design, and is High Treason.

6. It was agreed that to make a Misprision of Treason, there must be a Knowledge of the Design, and of the Persons, or some of them; for a Man cannot be said to conceal what he doth not know; and therefore, if one

What requisite to make Misprision of Treason.

tell

tell I. S. in general, that there will be a rising without acquainting him with the Persons who are to rise, or with the Nature of the Plot, if I. S. conceal this, this is no Misprision of Treason, because he hath no knowledge of the Treason.

Misprision what is a discovery, and what not.

7. It was agreed that if one knew of a Treason, and knew some of the Conspirators, and then tell other Men in general Terms that there will be a rising, &c. without a discovery of the Plot, or the Traitors, such a Discourse will not acquit him from Misprision of Treason by concealment of it, because notwithstanding those general Discourses, both the Treason and the Traitors are concealed by him.

What shall be a discovery of Treason.

8. And in case such a Person who knoweth of a Treason, and the Traitors, and discovers all he knoweth to another Person who is not a Privy Councillor, or a Justice of Peace, or hath Authority to take Examinations concerning it, it was doubted whether such a discovery would acquit him from concealing of Treason which is Misprision.

Twyn's Case.

At the Sessions in the Old Baily, 20 Feb. 15 Car. 2. John Twyn was indicted on the Stat. 25 Ed. 3. of High-Treason, for compassing and imagining the King's Death, and the overt Act laid in the Indictment was, the Printing of a Seditious, Poisonous and Scandalous Book, entituled; A Treatise of the execution of Justice, wherein is clearly proved that the Execution of Judgment and Justice is as well the Peoples as the Magistrates Duty, and if the Magistrates pervert Judgment, the People are bound by the Law of God to execute Judgment without them, and upon them. And besides that Title of the Book, several Passages in the Book were set forth in the Indictment, which in substance were, first, That the supreme Magistrate is accountable to the People. 2. The People are incited to take the Management of the Government into their own hands. 3. The People are encouraged to take up Arms against the King and his Family. 4. They are stirred up to revolt, as an Action honourable and conscientious, and

Printing Treasonable Positions, an Overt Act to make good an Indictment, for compassing the King's Death.



and Encouragements given to any Town, City or County in the three Kingdoms to begin the Work. 5. The People are exhorted, not only to cast off their Allegiance, but to put the King to Death. And upon the Evidence it was proved, that Twyn being a Printer, by himself and Servants printed this Book; That he Corrected some of the Sheets, and that he scatter'd many of them to be Sold; and he was found Guilty, and had Judgment for High-Treason, and was accordingly Executed.

At this Tryal were present of the Judges the Chief Justice Hyde, and my self, and also my Brother Wyld Recorder of London, and resolved by all clearly, That Printing and Publishing such wicked Positions, was an Overt Act declaring the Treason of compassing and imagining the King's Death, which was also agreed by the rest of the Judges upon our discourse with them. At the same Sessions Simon Dover, Tho. Brewster, and Nathan Brookes, Printers and Booksellers, were indicted at the Common Law, as for a great Misdemeanour for printing and publishing one Book, called, The Speeches and Prayers of Harrison, Cook, Hugh Peters, and others condemned for the Murder of the late King, in which were many desperate Passages, justifying their Villany; and another Book called the Phoenix, or Solemn League and Covenant; In which also were passages of dangerous Consequence. And they being found Guilty, it was resolved, That the Printing be a Trade, and selling of Books also, yet they must use their Trade according to Law, and not abuse it, by printing or selling of Books scandalous to the Government, or tending to Sedition. So in case of a Councello at Law, he may plead his Client's Cause against the King; but if, under colour of that, he takes upon him to vent Sedition, he is to be punished.

Memorand. Cooke's Case, a Lawyer in Grays-Inn, who managed that Villainous Charge against the late King at his Tryal, would have excused himself, because he acted only as Counsel; but that would not serve his turn; he was executed with the rest. And in this Principal Case

Judgment.

Judgment a-  
gainst Brewster  
and others.

Cale the Persons were told, that the King had dealt Mercifully with them, that he did not proceed against them Capitally, and they were all fined, viz. Brewster 100 Marks, and Dover and Brookes 40 Marks apiece, and every of them, to stand in the Pillory, one day at the Exchange, from Eleven to One, and another day in Smithfield, for the same time, with Papers on their Hats, declaring their Offence, for Printing and Publishing Scandalous, Treasonable, and Factious Books against the King and Government, and to lie in Goal without Bail till the next Goal-delivery, and then to make an open confession and acknowledgment of their Offences in such words as should then be directed; and afterwards to remain in Prison during the King's Pleasure, and not to be discharged before every one of them put in good Sureties by Recognizance, themselves in 400l. apiece, and two Sureties for each of them in 200l. apiece, not to Print or Publish any Books but such as shall be allowed by Authority.

Newgate Sessions 14 Octob. 14 Car. 2.

Mary Raven, alias Aston, was indicted for stealing two Blankets, three pair of Sheets, three Pillowcases, and other Goods of William Cannon. And upon the Evidence it appeared, that she had hired Lodgings and Furniture with them for three Months, and during that time, conveyed away the Goods which she had hired with her Lodgings, and she her self ran away at the same time. And it was agreed by my Lord Bridgeman, my Self, and my Brother Wyld, Recorder of London, then present, that this was no Felony, because she had a Special Property in them by her Contract, and so there could be no Trespass; and there can be no Felony where there is no Trespass, as it was resolved in the Case of Holmes, who set fire on his own House in London, which was quenched before it went further. Vide the end of this Book, Kelying contra.

Co. Pl. Cor. 107,  
108.

*Murder*

At the same Sessions one was indicted for Murder, and upon his Tryal was found Guilty of Manslaughter, and then offered to plead the King's Pardon, which upon sight of it pardon' feloniam & feloniam interfeccon' of the Man slain, Non obstant' the Stat. of 10 E. 3. & 13 R. 2. which was agreed

agreed by us all to be a Pardon of Murder, notwithstanding the Proceedings in Rickabee's Case by Rolls during the late Troubles, and then the Question was, if now the Party had not lost the Benefit of his Pardon; for he that pleads a Pardon confesseth the Fact, and relyeth upon the King's Mercy: And therefore, if after his Pardon, he plead not Guilty, he waiveth his Pardon, which is clear Law. But here the Question was, because this Pardon here by the express words pardons Manslaughter only, and then by reason of the non obstant, it extends to pardon Murder, whether tho' he waived it as to Murder, he might not make use of it as to Manslaughter. And as to that, there being some difference in Opinion, the Party was bailed, and had a Certificate from us of the nature of the Case, and thereupon obtained a new Pardon. But it was agreed by us all, if the Pardon had not extended to pardon Murder, he could not possibly make use of it. And therefore, upon this Tryal, he was only found guilty of Manslaughter, he might plead that Pardon, and it should have been allowed: And after, when he came to plead his new Pardon, and that was allowed, he paid Gloves to the Judges, which is a due Fee for that, Vide 4 E. 4. 10 B. Pulton de pace 88. a.

Gloves due to Judges on allowance of Pardons.

Memorandum, In the aforesaid Case it was moved, that the Court should not absolutely discharge the Person, but ought to commit him or bail him, until the Year and a Day after the Fact committed, by the Statute of 3 H. 7. c. 1. But upon sight of that Statute it appeared that that Statute extends only where Persons are indicted for Murder, and are acquitted, there they are to be committed or bailed till the Year and Day past, that if any one will bring an Appeal, he may be forthcoming; But extends not to Persons who being indicted for Murder, are found guilty of Manslaughter, or se defendendo, or by mischance.

Stat. 3 H. 7. for committing or bailing extends only to such as are acquitted for Murder, and to such as are found guilty of Manslaughter.

At the same Sessions, one John Roberts was indicted as a Principal in a Burglary, and upon the Evidence it appeared, that he was only accessory after the Fact, by receiving those who did it, and the Goods, and thereupon it was doubted, that if the Jury should acquit him,

One acquitted of the principal Fact cannot after be arraigned as Accessary before the Fact, but he may be arraigned again as accessory after the Fact.



Accessory before  
or after, Diversi-  
ty as to acquittal  
on Indictment  
as Principal.

as they must upon this Indictment, whether he might afterwards be indicted as Accessary. And therefore to avoid all doubt, the Court discharged the Jury of him, and ordered another Indictment to be against him as Accessary. But afterwards, upon Consideration of the Books, we did agree, that the Law was, If one was indicted as Principal and acquitted, he cannot after be indicted as accessary before the Fact: But notwithstanding such Acquittal, he may be indicted as accessary after the Fact, and the Reason is, because he that commands or advises a Robbery, Burglary, or Murder to be committed is quodam modo guilty of the Fact; And therefore if he be found not Guilty of the Fact, being indicted as Principal, he cannot afterwards be tried as Accessary before the Fact, because by the former Verdict, he is found not to be guilty of the Fact, which extends to all guilt before the Principal Fact committed. But an Accessary after is not guilty in any sort of committing the Fact, for it was done before he knew any thing of it; therefore if he be tried as Principal, and found not Guilty, he may be after indicted as Accessary after; for that is an Offence subsequent to the committing of the Fact, and is for receiving the Felons, or after the Fact done, which is an Offence of another nature: So are the Books, 27 Ass. Pl. 10. 8 H. 5, 6, 7. And so have the Presidents upon Examination always been at Newgate Sessions.

Disorder or  
neglect, not ex-  
cuse the Person  
who gave the  
Wounds,

At the same Sessions, Edward Rew was indicted for killing Nathaniel Rew his Brother, and upon the Evidence, it was resolved, that if one gives Wounds to another, who neglects the Cure of them, or is disorderly, and doth not keep that Rule which a Person wounded should do; yet if he die it is Murder or Manslaughter, according as the Case is in the Person who gave the Wounds, because if the Wounds had not been, the Man had not died; and therefore neglect or disorder in the Person who received the Wounds, shall not excuse the Person who gave them.

At the same Sessions, Thomas Middleton, Cooth-drawer on Ludgate-hill, was indicted for Harpying two Wives, and upon his Tryal, he produced a Sentence of Divorce from his first Wife under Seal Causa, Adulterij of her part, and agreed that he was not within that Statute, for Rooke's Case was stronger, which see, 1 Cro. 461. where the Divorce was causa sevitia, and that adjudged to excuse from the Statute.

Two Wives and Party divorced causa Adulterij not within Stat. 21 Jacob.

At the same Sessions, one Henry Burges was indicted for breaking up a Chamber in Somerset-house, and the Indictment lay'd it to be dom' Manconal' of the Person who lodged in it. And it was agreed, that the Indictment was not good, because all Somerset-house is one intire House of the Queen-mother, and all who Lodge in it are her Servants; and therefore it ought to be dom' Manconal' of the Queen-Mother. So for White-hall, which is the King's House; and it differs from the case of an Inns of Court, where every Gentleman hath a several Interest, and therefore there every several Chamber is domus Manconal' of the Person who hath the Interest.

Chamber in Somerset-house, not the Mantion-House of him who abideth in it; otherwise of a Chamber in Inns of Court.

At the same Sessions, one John Legg, being indicted for the murder of Mr. Robert Wise. It was upon the Evidence agreed, that if one Man kill another, and no suddain Quarrel appeareth, this is Murder, as Co. 9. Rep. fol. 67.b. Makelly's Case. And it lyeth upon the Party indicted to prove the suddain Quarrel.

Murder to kill one without cause, the suddain Quarrel lyeth in the Prisoner to prove.

And in this Case it was also agreed, that if two Men fall out in the Morning, and meet and fight in the Afternoon, and one of them is slain, this is Murder, for there was time to allay the Heat, and their after-meeting is of Malice.

Quarrel in Morning, Fight in Afternoon, Murder.

At the same Sessions, George Thorely, being indicted for Robbery, refused to plead, and his two Thumbs were tyed together with Whipcord, that the pain of that might compel him to Plead, and he was sent away so tied, and a Minister perswaded to go to him to perswade him; And an Hour after he was brought again and pleaded.

One stand Mute, Thumbs ty'd together with Whipcord.

ded. And this was said to be the constant Practice at Newgate,

What Circumstances inquirable where one kills another in keeping the Peace, or where a Parent or Master kills a Child or Servant in Chastizing.

Note, That although if an Officer or other Person kill another in preserving the Peace, or a Parent, Master, or Schoolmaster kill his Child, Servant or Scholar in chastizing or correcting him, this shall be said to be per Infortunium, yet vide Stat. 1 Jac. c. 8. for stabbing, there at the end of it, there is a proviso, that that Statute shall not extend to any Person who shall kill in keeping and preserving the Peace, - so as the Whorehouse be not committed wilfully and of purpose, under pretext of keeping the Peace; nor to a Master or Parent in chastizing his Child or Servant, besides his or their Intent or Purpose, so that those Circumstances are inquirable in those Cases.

Clergy, the Court Judge of reading, not the Ordinary.

Vid. 9 E. 4. 28. One demands his Clergy, and the Court took the Book and turned him to a Clerse, and he could not read well, but read one word in one place and another word in another place. And the Judges asked the Ordinary if he would have him; and he answered yea. The Judges bid him consider, and told him the Court was Judge of his reading, and if the Court should Judge he did not read, the Ordinary should be fined, and the Prisoner hanged, notwithstanding his demanding of him, and he was hanged, Vid. Fitz Abridgment, titulo Corone 32. And vide at the end of the Case in the Book at large, viz. 9 E. 4. 28. Several Books are cited where in the absence of the Ordinary, the Court delivered the Book to the Prisoner, Vid. the same Book.

In the absence of the Ordinary the Court may deliver the Book F. N. B. 66, b. accordingly the Court delivered the Book in absence of the Ordinary. Pardon void, because the King did not take notice the Party had abjured.

A Man who had abjured the Realm for the death of a Man, was brought to the Bar, and being demanded what he could say, why execution should not be awarded. He pleaded the King's Pardon, which was disallowed, because there was no mention in it, that he had abjured; and after he prayed his Clergy, which was disallowed ut supra; and after he pleaded, he was taken out of a Sanctuary, and desired to be restored, which the Court refused, and said he should not have that Plea, because being asked what he could say, why Judgment and Execution



execution should not be given and awarded against him, he had pleaded his Pardon, and that being disallowed, he should not be received to plead any other Plea, which was rul'd accordingly, for he was hanged. So Note, That a Prisoner in such a case, must at his Peril plead such a Plea as he will stand to, for it is peremptory to him if the matter, &c. pleaded be judged against him; yet after such Plea, he may and ought to have the benefit of his Clergy.

When a Prisoner is demanded what he can say, why Judgment should not be given, His first Plea is peremptory if that be over-ruled, yet Clergy allowed in that case after Plea judged against him.

At the Sessions for Newgate, 20 April 1664. 16 Car. 2. The Chief Justice Hyde, my Self, and Justice Wylde present, One John Joyner was indicted for stealing a Copper, and upon the Evidence it appeared the Copper was fired to the Free-hold, and he broke it up and carried it away; And thereupon the Jury was directed by the Court, that he was not Guilty, because it was no Felony: But my Lord Chief Justice Hyde said, that it being so rank a Trespass the Jury might find it Specially, that he did take up the Copper, but that it was fired, and so leave it to the Court, to judge whether Felony or no, and thereupon the Court Judge it Trespass, and fine him, and give him other Punishment fit for such a Trespass, as the Court did in Holmes's Case, Cro. 1 part. 376, 377. But my Brother Wylde and I differed in that Point, and said it was not like Holmes's Case; For there all the Special matter was expressed in the Indictment, viz. That Holmes being possessed of a House in London, did Feloniously set on Fire his own House and burn it with intent to burn the Houses of other Men near adjoining, and of this the Jury found him Guilty, and before Judgment, because the Court doubted whether it was Felony or no, the Record was removed from the King's Bench, and the advice of all the Judges taken, and agreed, that it was no Felony; And thereupon all the Special Matter being in the Indictment, and he found guilty of that as it was said, In Law it being no Felony, he was found guilty of the Trespass, for which the Court gave Judgment against him. But in this case he is indicted generally for stealing a Copper, which may not be fired, and if the Jury should find him Guilty generally, the Court must give Judgment as for Felony. For the Special Matter that it was fired is not laid in the Indictment. And it would be dishonourable for the Court in so plain a Case as this,

Where upon an Indictment for Felony, the Court may give Judgment for Trespass.

to suffer the Jury to find a Special Verdict; so all agreed that the Jury should find him not Guilty, which was done accordingly, Vide 2 H. 7. 10, b. Though Felony includes Trespass, yet if the Party indicted be discharged of the Felony, which is Principal, he is thereby acquitted of the Trespass, tamen Quare of this, and vid. the Book.

*Burglary to break an House in the Night with intent to commit Felony.* At the same Sessions John Locost and Lawrence Villars were indicted for Burglary for breaking and entering a Man's House with an intent to ravish his Wife, and were found Guilty, and had Judgment to be hang'd. Upon the Evidence, the Fact was very foul, for the Woman was actually ravished by one, and afterwards they thrust a Torch betwixt her Legs, &c.

*Will. Turner's Case.* At the same Sessions there was this Question, Our James Turner and William Turner, at Christmas Sessions last, were indicted of Burglary for breaking the House of Mr. Tryon in the Night, and taking away great Goods of Honey; and thereupon James Turner was found Guilty and executed; but William Turner was then acquitted. And now there being great Evidence that William Turner was in the same Burglary with James Turner, and there being 47 l. of the Honey of one Hill, a Servant to Mr. Tryon, Stolen at the same time, which 47 l. was not in the former Indictment, they would have indicted William Turner again now for Burglary, for breaking the House of Mr. Tryon, and taking thence 47 l. of the Honey of Hills; but we all agreed that William Turner being formerly indicted for Burglary in breaking the House of Mr. Tryon, and stealing his Goods, and acquitted, he cannot now be indicted again for the same Burglary for breaking the House; but we all agreed, he might be indicted for Felony, for stealing the Honey of Hill. And they are several Felonies, and he was not indicted of this Felony before, and so he was indicted. And afterwards I told my Lord Chief Justice Bridgeman what we had done, and he agreed the Law to be so as we had dictated.

At the Lent Assizes at Cambridge, 16 Car. 2. Clement Simson was indicted for breaking an House in the day-time, no body being in the House, and stealing Plate to the value of 10 l. And upon the Evidence it appeared, that he had taken the Plate out of a Trunk in which it was, and laid it on the floor; but before he carried it away, he was Surprized by People coming into the House. And the Chief Justice Hyde caused this to be found specially, because he doubted upon the Stat. of 39 Eliz. cap. 25. that Enorm, that if any one be found guilty of the felonious, taking away any Goods, &c. out of any House in the day-time, above the value of 5 s. he should not have the benefit of his Clergy. Whether this were a taking away within the Statute. And on the 13 Jan. Car. 2. All the Judges being met together, this Question was propounded to them, and agreed that Clergy was taken away in this Case. For the Stat. of 39 Eliz. does not go about to declare what shall be Felony, but to take away Clergy from that kind of Felony. For breaking an House in the day-time, no body being therein, and stealing Goods above the value of five Shillings, so that the Felony is in Common Law; And by the Common Law, breaking the House and taking of Goods, and removing them from one place to another in the same House, with an intent to steal them is Felony; For by this taking them he hath the Possession of them, and that is Stealing and Felony. Vide for this 27 Aff. Pl. 39. Br. Corone 107.

Removing Goods from one place in an House to another by a Thief, who intended to steal them is Felony, tho' he be surprized before he carry them away. And if a Thief do so in the day-time, by breaking an House no body being therein, his Clergy is taken away by Stat. 39 Eliz. if the Goods be above the value of 5 s.

At the same time it was propounded to all the Judges. If a Man and his Wife go both together to commit a Burglary, and both of them break a House in the Night, and enter and steal Goods: what offence this was in the Wife, and agreed by all, that it was no Felony in the Wife: for the Wife being together with the Husband in the Act, the Law supposeth the Wife acted it by coercion of the Husband, and so it is in all Larcenies; but as to Murder, if Husband and Wife both join in it, they are both equally Guilty, Vid. 2 E. 3. F. Corone 160. 27 Aff. Pl. 40. F. Corone 199. Poulton de pace 126, b. And the Case of the Earl of Sommerfet and his Lady, both equally found guilty of the Murder of Sir Thomas Overbury, by poisoning him in the Tower of London.

Husband and Wife commit Larceny or Felony together, no Felony in Wife, but only the Husband is Guilty, otherwise in case of Murder both Guilty.

At



At the Goal delivery for Newgate, holden 31. August, 16 Car. 2. my Lord Bridgeman, my self, and my Brother Wylde, Recorder of London, being present; Ann Davis was indicted for murdering her Male Bastard Child, and the Indictment was not special as the Statute is for concealing it, &c. But the Indictment was quod Infantem masculum vivum parturit qui quidum infans masculus adtunc & ibid. vivus existens natus per legem hujus regni Angl' spurius fuit, Anglice, a Bastard, and then goeth on in the ordinary form, that she murdered it, and doth not conclude Contra formam Statut. And it was doubted by us, whether the Indictment ought not to be special. And we caused Presidents to be searched, and 2 Car. 1. there was a special Indictment, but after 4, 5 & 6 Car. 1. All the Indictments were as this is, and Mr. Lee Clerk of the Peace for London, said that the form was altered, and made as it is now by the Advice of the Judges at that time, who agreed that clause which is now in the Indictment, should be put in and to conclude generally contra pacem, &c. and not to conclude, contra formam Statut. For Murder was an Offence at Common Law; and the Statute declareth, that where the Child is concealed, it shall be taken to be born alive, and if it be dead it shall be taken, that it was murdered, and so the Statute doth not make a new Offence, but maketh a Concealment to be an undeniable Evidence that she murdered it; and so the Court was satisfied, and went on upon the Indictment, and upon the Evidence it appeared, that the Prisoner lived in a Chamber by her self, and went to Bed on Thursday night well, without any pain, and in the middle of the Night waked full of Pain, and knocked for some body to come to her, and one Woman heard her knock, but came not to her, and the same Night she was delivered of a Child, and after she put the Child in a Trunk, and did not discover it till Friday Night following, and all this was found specially to have the advice of all the Judges, whether that knocking for help at the time of her Travail (alho' she concealed it after one day) exempts her from that Statute. For there was no sign of any hurt upon the Body of the Child. But thus far it was agreed by us, that if there be an Intent in the Woman to conceal the Child, then it is Murder by that Statute, though in

Special Verdict.

truth the Child was dead born. But if there was no Intent to conceal it, or if she confess her self with Child before hand, and after she is surpris'd and deliver'd, no body being with her, this is not within the Statute, because there was no intent to conceal it, and therefore in Case, if there be no sign of hurt upon the Child, it is no Murder.

If no intent to conceal the Child, not Murder within the Statute.

At the same Sessions Joseph Clarke was indicted in London for High Treason, for Coining of Money, and upon the Evidence it was proved against him in London, as it ought to be, the Indictment being there, but a great deal of more Evidence was given against him of committing the same Crime in Middlesex, and in Essex, which was agreed to be good Evidence to satisfy the Jury.

*Joseph Clark's Case for coining of Money.*

*Vid. Devant. 15, 2.*

One Richard Oliver who had been Partner with him in the Crime, and formerly convicted for that Crime, and had obtained the King's Pardon, was used as a Witness against him, together with other Witnesses. And it was agreed by us all, that the bare uttering of False Money, though the Party know it to be False Money, is not High Treason, nor Conspiracy of Treason; For nothing is Conspiracy of High Treason but concealing it, yet the uttering of False Money is a great Conspiracy inable, if the Party know it to be False: But if he that utters it know the Person that Coined it, or if one help a Coiner with Instruments and Tools to Coin withal, or furnish him with Silver for his coining, and Money is coined accordingly, in every of these Cases it is High Treason in them who utter the Money, or assist the Coiner with Materials, for they are all aiding to the Treason; and in High Treason, every one who giveth aid or assistance to it, are Principals; for there are no Accessories in Treason, and they are guilty of coining as well as he that Coined it.

A Form of a Comblation for High Ways, by the View of a Justice of Peace, which he is to return to the next Sessions, and a Form of an Order thereupon, which I had from my Lord Hyde.

*Bedford.*

Memorand' quod Un' — Justiciar' Dom' Regis ad pacem in Com. præd. conservand' nec non ad diversas felonias & transgression' & al' malefacta in eod. Com' perpetrat' audiend. & terminand' assignat' ad hanc Generalem Sessionem Pacis Com. præd. tent. apud — infra Com. præd. — die &c. Anno Regni Dom. &c. coram prefat. — & — Justic. pacis in Com. præd. virtute Statut. Dom. Eliz. nuper Reginae Angl' in Parlamento tent' apud Westmon' 12 die Jan. Anno nuper Reginae 5 & secundum formam & effectum dict. Statut. Intitulat. *An Act for the rebuilding of a Statute made An. 2 & 3. Phil. & Ma. for the mending of Highways,* super propriam notitiam suam presentavit qd. Quædam cumunis & Antiqua Regia via infra paroch. præd. in Com. præd. quæ ducit de Paroch. præd. ad de. — villam in Com. præd. (mercatoriam villa existen.) a quodam loco vocat. in Paroch. præd. usque ad quendam pontem communiter vocat. in Parochia prædict. non est bene & sufficienter reparat. & emendat. secundum formam & effect. Statut. præd. sed modo est in magno decasu ita quod subditi dic. Dom. Reg. per viam præd. cum equis, plaustris, Carrucis & Carriagijs & al' necessarijs suis prout solebant & debent absque magno periculo transire seu laborare non possunt in cuius rei testimonium præd. — manum & sigillum suum apposuit.

Super quo ad eandem Generalem Sessionem pacis ibid' tent. die & anno supradictis, præd. Justiciarj Dom. Regis ad pacem Dict. Dom. Regis in Com. præd. conservand. assignat. assessaver. & imposuerunt finem 40l. levand. de Inhabitantibus dict' Paroch. de — in quorum Defect' via præd. non est bene & sufficienter reparat secund. formam Stat. præd. si præd. via non sit sufficienter reparat. & emendat. ante Festum sci' Johannis Baptist. prox. futurum.

What only is  
traversable on  
this Conviction.  
Vid. *Saunders*  
*Reps. 2 p. 160.*

Memorandum, Upon such a Conviction the decay of the High-way cannot be traversed, but they may plead, that some other Person ought to repair it, and traverse that they ought not, but the decay being upon View of a Justice of Peace cannot be gainsaid or traversed.



This is the best way to have all High ways amended if the Justices of Peace would do their Duty. My Lord Hyde also told me, that it was resolved by all the Judges in Gaye's Case, 2 Car. 1. that if a Recusant who was proclaimed at the Assizes according to the Statute, render himself the next Assizes to plead or traverse, &c. he must appear in Person, and he is to be in Custody, for the words of the Statute and of the Proclamation are, that he shall render his body to the Sheriff of the County, &c.

Recusant after Proclamation to appear in Person, and to be in Custody.

At the Sessions in the Old-Baily holden there the 12 October 1664. A Silk Throster had Ben come to Work in his own House, and delivered Silk to one of them to Work, and the Workmen stole away part of it. It was agreed by Hyde Chief Justice, my self, and Brother Wyldc being there, that this was Felony, notwithstanding the delivery of it to the Party, for it was delivered to him only to Work, and so the intire property remained then only in the Owner, like the Case of a Butler, who hath Plate delivered to him; or a Shepherd, who hath Sheep delivered, and they steal any of them, that is Felony at the Common Law, Vid. 13 Eliz. 4. 10. 3 H. 7. 12. & 21 H. 7. 14. accord. Poulton de pace 126.

Felony in Goods, Notwithstanding the delivery of them.

At the same time there being Discourse about the restitution of Goods Stolen, (to the Owner, who had prosecuted the Thief) my Brother Wyld said that it had been resolved upon the words of the Stat. of 21 H. 8. Cap. 11. which giveth restitution of Stolen Goods to the Owner in case the Thief be upon his Evidence found Guilty, that notwithstanding a Sale in a Market Overt by the Thief of the Goods Stolen; yet the Party shall have Restitution: And he said, so was the practice at the Old-Baily. But my Lord Hyde and my self, were of a contrary Opinion, because at Common Law, a Sale in a Market Overt by a Party who hath no property shall bind the right of the true Owner, and so is More Rep. 360. The Bishop of Worcester's Case, where to a Restitution granted at a Sessions of Newgate, the Party who had bought the Goods pleaded a Sale to him in a Market Overt, there the Case was adjudged against the Defendant, because it appeared not to be a Sale in a Market Overt. For it was Plate sold in a Scrivenet's Shop in London. But there no Question

Restitution of Stolen Goods, if grantable to the Prosecutor upon the Statute in case the Goods were sold in a Market Overt.

*Just Sea p. 47. 8.*

tion is made, but that a Sale in a Market Overt would have hinder'd the restitution, and bound the property of the right Owner. And by the Stat. of 31 Eliz. cap. 12. which in case of Horses Stolen, enableth the Owner to have Restitution if he claim them, within six Months after they are sold by the Thief in a Market Overt, and yet that is, if the Owner pay the Party who bought the Horse in the Market Overt, so much as he will swear he paid bona fide for the Horse: But this Restitution of Horses upon the Stat. of 31 Eliz. hath no great relation to that Restitution upon the Stat. of 21 H. 8. they being of two federal natures, therefore Quare legem. Vide postea 18, a. con. and so is the constant Practice.

One challenged  
36, hanged and  
not pressed.

3 H. 7. 12. a. One arraigned before Fairfax Bryan, and Haugh at Newgate for felony, challenged 36, and the Question was, what should be done with him, and all the Judges of the one Bench and the other agreed, that he should be hanged and not pressed to Death, and this Rule they would have all the Judges to observe in their Circuits, notwithstanding the Opinion tempore E. 4. to the contrary; and yet in the very same Page it is said in another Case upon the like Challenge, the Book saith the Opinion was, that he should be pressed as a Person that refused the Law.

One abjureth  
for Felony, and  
being after taken in England  
he stands Mute,  
he shall be  
hang'd; but 26  
Aff. Pl. 19  
Br. Payne 12. is  
to the contrary,  
but that seemeth  
not to be Law.

30 Aff. Pl. 3. Br. Payne and Penance 2. One abjureth and is after taken in England, and demanded what he could say, why Execution should not be awarded, he stands Mute, he shall be hanged, and not put to Penance or Pressed; because he was attainted of the felony before by his Confession: For he cannot have the benefit of the Sanctuary to abjure, unless he confess the felony which is enter'd on Record by the Coroner; and there it is said, if a felon plead not Guilty upon his Arraignment, and after stand Mute before his Tryal, it is as if he had not pleaded: But if upon his Arraignment he confess the felony, and after being demanded what he can say, why Execution should not be, he stands Mute, there he shall be hanged. Note, It seems to me, that in the Case before, where a felon pleads not Guilty, that if after, upon his Tryal he stand Mute, yet the Jury shall be charged with him, and Evidence given for the King; and if he be found Guilty he shall be hanged; for after the Prisoner hath pleaded once not Guilty he cannot hinder the Tryal, and

As to standing  
Mute, where the  
Judgment shall  
be to be pressed,  
and where  
proceed to Try-  
al, and put him  
upon the Jury.

and therefore I suppose that Case is to be intended when the Prisoner only pleaded not Guilty, and being asked how he would be tryed stands Mute, and refuses the Tryal of Law, there the bare pleading of not Guilty is as nothing; but in case he pleadeth not Guilty, and for Tryal puts himself on the Country, then if after he stands Mute, yet the Court shall proceed to his Tryal, and so the Book of 15 E. 4. 33. Br. p. 9. A Felon is arraigned and pleads not Guilty, and puts himself upon his Country, and then challengeth 31, and thereupon is a Tales granted, and then he stands Mute, and the Jury was charged with him and found Guilty.

In an Appeal for Felony if the Prisoner stands Mute, he shall have Judgment to be pressed, as in case he had been arraigned at the King's Suit, and stands Mute. 43 Aff. pl. 30. Br. Payn. 13 & 14 E. 4. 7. Br. ibid. 15.

Mute in appeal the same Judgment as upon Indictment.

At the Sessions at the Old-Baily the 7th Decemb. 1664, A Woman in One Jane Jones, together with one Thomas Wharton, were indicted for Burglary, and she pleaded her self to be married to Wharton, on purpose to be excused, being with her Husband at the Burglary, and she refused to plead by the name of Jones, and thereupon we called for the Jury, which found the Indictment, and in their Presence, and by their Consent, we made the Indictment as to her name to be Jane Wharton alias Jones; but we did not call her Jane Wharton the Wife of Thomas Wharton, but gave her the addition of Spinster; and then she pleaded to it, and the Court told her, that if upon her Tryal, she could prove that she was married to Wharton before the Burglary committed, she should have the Advantage of it: But on the Tryal she could not prove it, and so was found Guilty, and Judgment given upon her.

Burning in the Hand for Felony, no Exception against his being Witness.

At the same Sessions, at the Tryal of a Prisoner, he took exception against the Witness against him, because he had formerly been burnt in the Hand for Felony; but the Chief Justice Hyde, Keeling, and Wylde, Recorder, being present, held that to be no exception, and in civil Causes such Persons are frequently admitted for Witnesses; and it differs from cutting off Ears, standing in

Bulstrode 2 part 155. One attainted of Felony and pardoned is no good Witness. Modus deciman. di so prov'd, disallowed.



the Pillory, or other stigmatizing, because those Punishments make the Person Infamous, and so he is not allowed for a Witness: But burning in the Hand does not so, because it cometh in the place of purgation at the Common Law, which supposeth he might be not guilty, notwithstanding the Verdict. And therefore at the Common Law, he that confessed a Felony, could never be admitted to his Purgation, for there could be no presumption of not guilty against his own Confession. Vide Godbolt 288.

By the Statute of 18 El. 17. He who hath Clergy, is totally discharged. *Vide Membr. fol. 25.* If Clergyman burnt in the Hand, and after sued to be deprived for that Cause, prohibition. *Vide Co. 5. c. 110. Foxley's Case,* and it is in lieu of Purgation, which admits Guilty, especially after Judgment and Attainder.

One committed for refusing the Oath of Allegiance, discharged as no such Oath to induce the penalty of a Premunire.

An Alien living here, is a Subject within the Statute of Quakers.

At the same time and Sessions, One Isaac Marriot, and others were committed, and the Mittimus was for refusing to take the Oath of Allegiance, and so the Justice of the Peace thought to bring them into a Premunire; but the Court discharged him and the rest, because the Oath intended was the Oath enjoined by the Statute of 3 Jac. cap. 4. and it is not an Oath of Allegiance, though it be commonly so called; but in truth it is an Oath of Obedience, and so the Court discharged them, because there was no such Oath of Allegiance, &c.

At the same Sessions, upon the Tryal of several Quakers for their third Offence after two former Condemns before the Justice of Peace upon the Statute of 16 Car. 2. An Act to prevent and suppress seditious Conventicles; One of them pleaded, that he was an Alien born in France, and so not within the penalty of that Act, because the Statute says, that every Person above the Age of 16 Years, being a Subject of this Realm, shall, &c. And he said he was no Subject, and so not within the Law: It was agreed by us all, that if an Alien come into this Kingdom, and live under the King's Protection, that as long as he liveth here he is a Subject of this Realm, and punishable for transgressing the Laws thereof, according to Calvin's Case, Co. 7 Rep. 6, b. and shall be indicted for High-Treason, and the Indictment concludes contra Allegiance suam debitam. But if the Statute had said been a natural-born Subject of this Realm, then it had not extended to him, and that also appeareth by the penning of several Statutes, some being generally Subjects, or all Subjects, &c. which extend to Aliens which live here, and

and other, that all Natural-born Subjects, which extend to them only who are such, and not Aliens who live here, and accordingly we proceeded against him, and he had Judgment to be Transported.

At the same Sessions, Francis Trollop was indicted for stealing the Goods of Matthias Bowyer, and upon the Evidence it appeared, that the Goods were not Bowyer's, that he was a Glostershire Carrier, and in his Journy they were stolln from him, and agreed that the Indictment was well enough, for tho' he had not the absolute property in the Goods, yet he had a possessory Property, for which he may maintain an Action of Trespass against any one that took them from him; and so may indict a Thief for taking his Goods, and so the Indictment is good either for stealing the Goods of the Carrier or of the right Owner.

A Carrier hath Goods deliver- ed, and is rob'd, the Indictment is good, that he stole the Goods of the Carrier.

At the same Sessions, One Joseph Fabian, a working Goldsmith, was indicted for falsifying Plate, and by putting in too much Copper, made it some Pieces 2d. in others 3d. 4d. 5d. 6d. 7d. in the Duncce worse than it ought to be, and then corrupted one of the Essay Masters Servants to help him to the Old Marks of the Leopard's Head, and other marks which are set on Plate when it is essayed and found good, and with those Marks he marked his false Plate at his own House, and so he sold his Plate to the selling Gold-smiths, who did not mistrust it, because they saw it marked: For the Essay Master is so curious, that if the Plate be the fourth part of a Farthing more than it ought to be, they break it in pieces, and the old Marks ought always to be broken in pieces when new Marks are made. And because the Essay Master had not caused those old Marks to be broken, he was turned out of his Office, and Fabian, who was, found Guilty, fined 100l. and adjudged to stand in the Pillory three days, from eleven of the Clock until one, that is to say, once at the Old Change, and another time in Cheapside, and the third time before Goldsmiths Hall, with a Paper in his Hat, declaring his Crime, and he was also forejudged of his Trade, that he should not use that Trade again as a Master-Workman.

Goldsmith for falsifying Plate.

Judgment.

Fore-judged not to use his Trade as a Master-Workman.

Manſlaughter  
and Miſadven-  
ture in what  
Caſes.

London Streets  
and a Country-  
Town much  
differ.

In the Sessions in the Old Baily holden the 13 of January 1664, One John Hull was indicted for the Murder of Henry Cambridge, and upon the Evidence, the Case was, that there were ſeveral Workmen about building of a Houſe by the Horſe-Ferry, which Houſe ſtood about 30 Foot from any High-way or Common Paſſage, and Hull being a Maſter-workman (about Evening when the Maſter-workman had given over Work, and when the Labourers were putting up their Tools, was ſent, by his Maſter to bring from the Houſe a piece of Timber which lay two Stories high, and he went up for that piece of Timber, and before he threw it down, he cried out aloud, Stand Clear, and was heard by the Labourers, and all of them went from the danger but only Cambridge, and the piece of Timber fell upon him and killed him: and my Lord Chief Juſtice Hyde held this to be Manſlaughter, for he ſaid he ſhould have let it down by a Rope, or elſe at his peril, beſure no body is there: But my Brother Wyld and my ſelf held it to be Miſadventure, he doing nothing but what is uſual with Workmen to do: And before he did it, crying out aloud, Stand Clear, and ſo gave notice if there were any near they might avoid it; and we put the Caſe, a Man lopping a Tree, and when the Arms of the Tree were ready to fall, calls out to them below, take heed, and then the Arms of the Tree fall and kill a Man, this is Miſadventure, and we ſhewed him Poulton de pace 120. where the Caſe is put, and the Book cited, and held to be Miſadventure; and we ſaid this Caſe in Queſtion is much ſtronger then the Caſe where one throws a Stone or ſhoots an Arrow over a Wall or Houſe, with which one is ſlain, this in Kelloway 108 & 136. is ſaid to be Miſadventure. But we did all hold that there was a great difference 'twixt the Caſe in Queſtion, the Houſe from which the Timber was thrown ſtanding thirty Foot from the High-way or Common Foot-path, and the doing the ſame Act in the Streets of London; for we all agreed, that in London, that if one be a cleaning of a Gutter, call out to Stand aſide, and then throw down Rubbiſh, or a piece of Timber, by which a Man is killed, this is Manſlaughter; being in London, there is a continual concourſe of People paſſing up and down the Streets, and



a new Passenger, who did not hear him call out, and therefore the casting down any such thing from an House into the Streets, is like the Case where a Man shoots an Arrow or Gun into a Market-place full of People, if any one be killed it is Manslaughter; because in common Presumption his Intention was to do Mischief, when he casts or shoots any thing which may kill among a Multitude of People; but in case that an House standing in a Country-Town where there is no such frequency of Passengers, if a Man call out there to stand aside, and take heed, and then cast down the filth of a Gutter, &c. my Brother Wyld and I held that, as far differing Case from doing the same thing in London. And because my Lord Hyde differed in the Principal Case, it was found Specially, but I take the Law to be clear, that it is but Misadventure.

Murder.

At the same Sessions James Rampton was indicted for the Murder of his Wife; and upon the Evidence the Case was, that he being a Hackney Coachman, found a Soldiers Pistol in the Street, and when he came home he shewed it to his Master, and they took the Gun stick and put it into the Pistol and it went down into the Muzzle of the Pistol, by which they thought it was not Charged, and his Wife standing before him, he pulled up the Cock and the Pistol went off, and being charged with two Bullets, wounded her in the Belly, and killed her, upon which he cried out Oh I have killed my dear Wife! and called in Neighbours, it was holden by us all, that this was Manslaughter, and not only Misadventure.

Manslaughter,  
Misadventure.

*Vid. Foster on Homicide  
Chap. 1<sup>st</sup> Sect. 4. b*

At the Common Law, if a Man had committed several Felonies, and had been arraign'd for one, and prayed his Clergy, yet he might be indicted for any other Felony and thereupon was made the Statute of Clergy, 25 Ed 3. c. 5. which required that a Clerk be charged with all Felonies, at once. And after that Stat. if a Man had committed several Felonies, some within Clergy and some without Clergy, and had been arraigned of one of the Felonies within Clergy and confessed of it, and his Clergy allowed for that, he was discharged thereof and could not be tried for any of the other Felonies which were committed 'twixt the first Felony and the time of the allowance of his Clergy for it, tho' the other Felons was without benefit of Clergy, Stam. pl. Cor. 107, b. Coke pl. Cor. 214. but now by the Statute

Quere.

Clergy allowed where may be put to answer for other Felonies notwithstanding.

*Vid. Recital 8  
El. cap. 4 agreed  
the Law so.*

Statute of 8 Eliz. c. 4. if Clergy be allowed, that doth discharge all other Felonies within Clergy; but he may be arraigned for a Felony, for which Clergy is not allowable, though it were committed before his Clergy were allowed: Co. Pl. Cor. 214. But now by the Statute of 18 Eliz. c. 7. it seems that although Clergy hath been allowed for oone Felony he may be indicted for another Felony also within Clergy committed before the time that his Clergy was allowed; for that Statute of 18 Eliz. speaks generally that all Persons admitted to the benefit of the Clergy shall notwithstanding answer to all other Felonies whereof they shall be indicted or appeal'd, and not being thereof before acquitted, convicted, attainted, or pardon'd; and if this be not the meaning of this Statute, then it is to no purpose; for all the other Cases where Clergy was not allowable were helped by the Statute of 8 Eliz. cap. 4. before mentioned. And my Lord Chief Justice Hyde told me that when his Uncle Sir Nicholas Hyde was Chief Justice, he meeting with a notorious Rogue for stealing of Sheep and Cows, all being within Clergy, caused him to be tryed upon one of the Indictments, and presently called the Ordinary, and upon his return, that he read, he allowed him his Clergy; and then after he tryed him at the same Assizes upon the other Indictments, upon which he was Convicted, and demanded his Clergy, which he denied him, because he had had his Clergy once allowed him, and so the fellow was hanged: But yet the Practice at the Sessions at the Old-Baily is contrary to this, and so that Statute of 18 Eliz. made of no Effect. But notwithstanding the Practice is conceived to be according to Law.

Burglary in  
*fraudem Legis.*

At the Sessions I inquired of Le Mott's Case, which was adjudged in the time of the late Troubles, and my Brother Wyld told me, that the case was this: That Thieves came with intent to Rob him, and finding the Door lockt up, pretending they came to speak with him, and thereupon a Maid Servant opened the Door, and they came in and Rob'd him, and this being in the Night-time, this was adjudged Burglary, and the Persons hanged; for their Intention being to Rob, and getting the Door open by a false pretence, this was in *fraudem Legis*,

gis, and so they were guilty of Burglary, though they did not actually break the House, for this was in Law an actual breaking, being obtained by fraud to have the Door opened; as if Men pretend a Warrant to a Constable, and bring him along with them, and under that pretence rob the House, if it be in the Night, this is Burglary.

At the Goal-delivery in the Old Baily, 5. April, 1665. *Farr's Case.*  
 my Lord Ch. Ju. Hyde, my self, and my Brother Wild, Recorder of London, then present one Richard Farrer, and Eleanor Chadwicke were Indicted for breaking the House of Robert Stanyer, and putting his Wife in fear, and stealing from thence several Goods; and upon the Evidence, the Case was that Mrs. Stanyer whose House was robb'd, had for many Years lived from her Husband, and hired this House, and a Lease was drawn up for the House in her Husband's Name, which he refused to Seal, and said he would have nothing to do with it, but the Landlord and she agreed, and she constantly paid the Rent, and had the House very well furnished, and had Plate, Jewels, and Household stuff of a very good value, and Farrer the Prisoner, and Eleanor Chadwick, who lived with him as his Wife, and so had done a great while, intending to rattle her House, laid this Design, (viz.) Farrer went to an Attorney of the Common Pleas, and told him that Mrs. Stanyer was his Tenant and in Arrear for Rent, and he had no way to get her out but by ejection. firmæ, and thereupon, he according to the way now used, made a casual Ejector of his own, and delivered a Declaration, and Eleanor Chadwick made a false Oath in the Common Pleas, that she had delivered a Copy of that Declaration to the Tenant in Possession, and thereupon Judgment was obtained (according to the course) against the casual Ejector, and a Writ to the Sheriff to deliver Possession, and thereupon Farrer got the Sheriffs Bailiffs to execute the Writ, and turn Mrs. Stanyer out of Possession, and at the same time Farrer took out a Latitat against Mrs. Stanyer, supposing a debt, and at the same time arrested her and would take no Bail, but caused her to be carried to Newgate, and then Farrer and Chadwick went to rattle their Goods in the House, and broke open Cupboards and Trunks, and took

*Robbers infra-  
 dem Legis by  
 colour of Law-  
 ful Pretences.*

*Vide postea and  
 Coffey's Case. 62, 8*



took away Jewels and Plate, and carried them into his own House, and hid them there, and carried away divers of the Goods by Night, and took the Pewter which had her Husband's Arms upon it, and got them taken out, and sold other of the Goods; and after upon Complaint to my L. C. Justice, by his Warrant Farre's House was search'd, and the Jewels and Plate there found, and divers other Goods; and Farre and Chadwicke, upon Examination by my Lord Chief Justice, were sent by him to Newgate, and now this Indiament preferred against them, and Farre being ask'd what colour of Title he had to the House, could pretend none, but it appeared that the true Landlord had received the Rent of it for many Years, and that no Rent at all was behind. And Farre being ask'd what cause of Action he had against Mrs. Stanyer to cause her to be arrested, could pretend none; and being likewise asked what Colour he had to break open Trunks and Cupboards, and to take the Goods and sell them, and cause the Coat of Arms to be expunged, he could make no pretence; and it was agreed by us all, that although they had made use of the Law and Officers of Law to get the Possession and Arrest the Woman, yet if all this done in fraudem Legis with intent to Rob, this course was so far from excusing the Robbery, that it heightened the Offence by abusing the Law, and the Process of it without Colour of Title, &c. As Co. Pl. Cor. 64. if Thieves pretending to be robb'd, raise Hue and Cry, and call a Constable in the Night, and cause him to search an House on pretence the Thieves are there, and thereupon, by Command of the Constable, the Door is opened, and they go in, and then rob the House, this is Burglary, though the House was not actually broke open by them, but opened at the Command of the Constable, for this being in fraudem Legis shall be accounted as an actual breaking in them, and so was Le Mott's Case adjudged, which is in this Book the next case before this, and so it hath been adjudged, that if Goods be distrained, and put in a Pound, and one who hath a design to steal them, goeth to the Sheriff and gets a Replevin for these Goods, and by colour of this Replevin, the Goods are delivered to him, and he dybeth them away and sells them, having no colour of Title to them, this is Felony. And we also agreed, that altho' Mr. Stanyer the Husband did not dwell in this House, and refused to have to do with it, yet the

Indiament

Indictment was well, for breaking open his Dwelling House, for whatever the Wife hath is the Husbands in Law, and it cannot be said to be the Wives House, and so direction was given to the Jury, that if they did believe that the Prisoners had done all this with an intent to Rob, they ought to find them Guilty, and the Jury did find them Guilty, and both of them had Judgment to be hanged, and were executed accordingly.

At the same Sessions, one Edward Parret was in the place where the Prisoners use to stand at the Goal-delivery, who was in for Murder, for which he had afterwards Judgment, and while he was there, one John Copeland a Scotchman, being in very good Clothes, went in thither under Colour to see him, and watching the time when the Keepers were busie, he opened the little Door which was bolted, and went out, and Parrett the Prisoner followed him, and the Keeper of the outward Door not knowing them, opened that to them, and they both went together out of the Yard, and run down By-Alleys into Shew-Lane, and so to White-Fryers, but the Keepers presently missing the Prisoner, made after them, and being told which way they run, overtook them in White-Fryers, and brought them both back, and thereupon Copeland was indicted for Felony, for rescuing Parrett, being indicted for Murder, and upon the Evidence it was sworn that after they were taken. Copeland said he had done nothing but what he ought to do to help away his friend, who was in danger of his Life, and on this Evidence he was found Guilty, and on his request he being to have Clergy, it was allowed to be put into the King's Pardon, amongst those Prisoners of that Nature, who were to be sent beyond the Sea, it having been lately used, that for Felonies within Clergy, if the Prisoner desire it, not to give his Book, but to procure a conditional Pardon from the King, and send them beyond Sea to serve 5 Years in some of the King's Plantations, and then to have Land there assigned them according to the use in those Plantations, for Servants after their time expired, with a Condition in the Pardon to be void if they do not go, or if they return into England during seven Years, or after without the King's Licence.

Rescuing a Felon by secret helping him away from the place where Prisoners are put at the time of Tryals in the Old-Baily.

Vide Stamford Pl. Cor. 30, 31,

32. Of breaking Prison and Rescous,

House robb'd in  
the Night after  
Goods brought  
into it, and  
whilst he is re-  
moving thither.

At the same Sessions one was Indicted for Burglary, for breaking open a House in the Night, and stealing away Goods, and upon the Evidence, the Case was, that he whose Goods were stolen, had hired the House which was broke open in the Night, and had the possession delivered him, and had removed several of his Goods from the House he formerly lived in, to the House which he had newly hired, but lay in his first House till he had removed the rest of his Goods, and fitted his new House, by setting up Beds to lie there: And in this time, before he had lodged in his new House, that House was broke open in the Night, and his Goods stolen. And it was doubted whether this were Burglary, because some of us held it could not be said to be his Mansion-house before such time as he had ever inhabited it, but others of us said it would be a very mischievous Case that Thieves might take such an Opportunity to rob in the Night, and have benefit of the Clergy; and if a Man have a Dwelling-house, and on occasion, he and his Family be out of it all Night, and then it is Robb'd, this is without question Burglary, and in this Case by taking the House to Inhabit, and bringing his Goods thither in order to Inhabit, and foregoing the Lodging only untill his Goods and Beds can be set up, this might well be called his Mansion-house, and should be so esteemed in Law, *Idco Quere Legem. See 1. Hawk. P. 6.*

Soldiers break-  
ing open Houses  
by warrant to  
search, &c.

At the same Sessions Mr. Martin Gardiner, and other Officers and their Soldiers, to the number of Nineteen, were indicted for breaking open the House of Jonathan Hutchinson near Cheapside in the day time, and putting him in fear, &c. and stealing away several Goods, and upon the Evidence, the Case was that the Lord Arlington, the King's Secretary, by order from the King made a Warrant to apprehend certain Persons named in the Warrant being dangerous Persons; and this Warrant was directed to one of the King's Messengers, and he having notice that those Persons named in the Warrant were at a meeting in Hutchinson's House, desired those Soldiers to assist him in the taking of them, whereupon they came to the House, and broke open the Door, and apprehended some of them, but in the doing of it, some of the common Soldiers without the Knowledge of their Officers, and against



against their command took away a Cloak, and some small things out of the House, but the Witnesses could not tell which of the Soldiers they were, but said, my Lord Mayor who took the Examinations could fix them upon the Persons; and my Lord Mayor being now absent, upon occasion of the Death of Sir Thomas Vynes, who died this Morning, I conceiving it necessary to say something to satisfy the Citizens and others standing by, did to this effect declare the Law, That if several Persons come into a House together with an intent to steal, if but one of them steal Goods, they are all equally guilty. 2. That this Warrant now produced was not sufficient to justify the breaking open the Doors of the House, and Soldiers ought not on any pretence to break open Houses unless they have with them a Civil Officer, as Justice of the Peace, or Constable. 3. That if Persons have a Warrant to apprehend any one, and they in order to execute the Warrant break open a Door, and mistake the Law in that Point; this breaking of the Door maketh them trespassers, but can never be interpreted to make them guilty of Felony; for their design was not to commit Felony, and there must be always a felonious Intent to make a Felony. 4. If after a Door broken with intent to apprehend a Person, any of the Company take away any of the Goods from the House, this is Felony in the Person that did it, and in none of the rest; unless it can be proved that any of the rest were assenting to the taking of the Goods, and then it is Felony in as many as consented; and after this done, by reason the Evidence could not be made out without the Examinations taken by my Lord Mayor and he was absent, therefore I discharged the Jury of them, and ordered Bail to be taken of them to appear the next Goal-delivery.

Where the breaking open a house Felony, and where not.

By Colour of a Warrant.

Vide, This Book before, concerning restitution of stolen Goods to the Prosecutor. If upon his Evidence, or evidence proved by him, the Thief be convicted, I have made a great Inquiry, and find that my Brother Wyld was in the right, for the Words of the Stat. of 21 H. 8. c. 11. are general, that where the Thief is convicted at the Prosecution of the Party robbed, there the Party robbed shall have restitution, and taketh no notice whether the Goods

p. 35.

Goods be sold in a Market Overt, or not; so by that Statute the Common Law is altered as to that Point. And for the Stat. of 31 Eliz. cap. 12. concerning Horses stolen, and sold in a Market Overt, the Owner may have them again if he make claim within six Months, and pay the Buyer what he paid bona fide, that is nothing to this Case. For that Statute giveth that kind of Restitution as to Horses, altho' there be no Prosecution. And for the Bishop of Worcester's Case, 'tis true, the Inference of the Book is as it is there said; but the main Point was not there in question, altho' in those times there was a doubtful Opinion what the Law was; and I spoke with Mr. Lee a very good Clerk, who hath attended the Sessions at the Old Baily above forty Years; and I asked him how the Practice there was, and he told me it was doubted till about 4 & 5 Car. 1. And then Justice Jones, and several other Judges advised about it, and did resolve that the Party who lost the Goods and prosecuted the Felon to Conviction should have restitution of his Goods which were stolen, notwithstanding they were sold in a Market Overt, and ever since that time he says the practice hath been accordingly. And if any one plead to a writ of Restitution in such a Case, that he bought the Goods in a Market Overt; Ever since the Resolution the other party presently demurr'd unto it, and had Judgment: And I think it to be a very good Resolution warranted by the Words of the Stat. of 21 H. 8. and tends to the advancement of Justice to make Men prosecute Felons, and it will discourage Persons from buying stolen Goods, tho' in a Market Overt; for under that pretence men buy Goods there for a small value of Persons whom they have reason to suspect, which Practice this Resolution will abate.

*Vide Co. sur magna Charta, p. 714. accord. notwithstanding a Sale in a Market Overt, in Case of an Appeal at Common Law; And Stat. 21 H. 8. saith that Restitution shall be made in case the Thief be convicted at the Prosecution of him who lost the Goods, as in the Case of an Appeal at Common Law.*

Where restitution, and where not.

Coke's Magna Charta is express in Point, that upon the Stat. of 21 H. 8. the Owner who prosecutes shall have restitution, notwithstanding a Sale in Market Overt. Note, If Goods be stolen, and not waived in sight, nor seized by some of the King's Officers, as suspected to be stolen, there the Party that is robbed may take his Goods again, or bring an Action for them, altho' he doth not prosecute, *Vide Co. 5. Rep. Foxley's Case 109. Stamford Pl. Coron. 186. b.* But if the Goods be waived by the Felon

Felon in his Flight, or in Case they be not waived, yet if they be seized by any of the King's Officers, as suspecting them to be stolen, there the Party shall not have Restitution, unless the Chief be convicted at his Prosecution, Vide Stamford, Pl. Cor. 186. b. And in such Cases the Party shall have Restitution only for such Goods as are expressed in the Indictment, and not for any other Goods tho' stolen at the same time, if they are omitted out of the Indictment, because by that omission the Chief might have escaped, Co. 5. Rep. Foxley's Case 110. Vide for these matters Stamford, Pl. Cor. Title Fresh Sure, 165. and Title Wayfe, 186. and the same Book Title

The Question, whether at this day there needs two Witnesses to convict a man of High Treason, hath grown only upon the Opinion of Co. Pl. Cor. 25, 26. where amongst other things, he delivers an Opinion that at the Common Law, two Witnesses are needful in Cases of Treason, and cites many Books in the Margin; but none of them warrant any such Opinion; and there are many things in his Posthumous Works, especially in his Pleas of the Crown concerning Treasons, and in his Jurisdiction of the Courts concerning Parliaments which he under a Suspicion, whether they received no Alteration, they coming out in the time of that which is called the Long Parliament, in the time of that desperate Rebellion against King Charles the first. But certain it is, there are many Errours in those places; but as to the main Question, it seemeth to me very plain by the express Words of the Stat. of 1 E. 6. c. 12. that at the Common Law one Witness was sufficient in High Treason; For the Words of the Stat. are, No Person after the first day of February, then next coming, should be Indicted, Convicted, &c. for any Offence of Treason, &c. Unless such Offender be accused by Two sufficient Witnesses, which proveth strongly, as I think, that before that time one Witness was enough, and in all Cases at Common Law, Proof by one Witness is sufficient, and no Authority, that I can find, in any Book is otherwise, so that I take the necessity of two Witnesses was induced by the Stat. in 1 E. 6. And then the Force of that Statute is taken away by the 1 & 2 Ph & Ma. cap. 10. which altho it were in the general a Law which expired

One Witness is enough in Treason, as it seemeth to me.

See Soft. 233.

See Soft. 236-239. Cont.



pired with that Queen, being made for preservation of her Person, yet that Clause in that Statute, that Trials for Treasons shall be according to the course of Common Law, is a perpetual Clause, and restoreth the Common Law as it was before the Stat. 1 of E. 6. and the Stat. 1 & 2 Phil. & Ma. cap. 11. which is the next Chapter concerning Treasons, in counterfeiting Monies, saith, that the Offenders shall be indicted, convicted, and attainted by such like Evidence, and in such manner as they might have been before the first Year of the late R. E. 6. which points expressly to the time when two Witnesses were required, and which by this Statute appeareth not to be at the Common Law.

*Vid. Stat. 1  
Jac. c. 21.*

Sale to Brokers  
not alter the Pro-  
perty.

That Brokers, as they are now used for taking to Pawn or buying of Apparel, Bedding, Plate, Jewels, &c. is an unlawful Trade, and enacted, that no Sale to such Persons in London, Westminster, Southwark, or within two Miles thereof, alters any Property; and that if they refuse to shew any such Goods so Pawned or Sold, they forfeit the double value: And so there is a difference betwixt the ancient Brokers and these new Brokers, so that by the Statute if any stolen Goods be bought by them, the Party may have his Action against them for the Goods, whether he prosecute the Felon or no, for the Property remains to the Owner, notwithstanding such Sale.

Jurors fined for  
finding Man-  
slaughter con-  
trary to directi-  
on of the Court,  
See before.

This course of  
fining was used  
in those days,  
but since con-  
demned, and  
never since used  
barely for giv-  
ing a Verdict  
contrary to Evi-  
dence.

Memorandum, At Lent Circuit at Winchester, 18 Car. 2. One Henry Hood was indicted for the murder of John Newen, and upon the Evidence it appeared, that he killed him without any Provocation, and thereupon I directed the Jury, that it was Murder; for the Law in that case intended Malice; and I told them they were Judges of the matter of Fact, viz. whether Newen died by the hand of Hood; but whether it was Murder or Manslaughter, that was matter in Law, in which they were to observe the direction of the Court. But notwithstanding they would find it only Manslaughter; whereupon I took the Verdict, and fined the Jury, of which John Goldwier was the Foreman, 5 l. apiece, and committed them to Goal till they found Sureties to appear at the next Assizes, and in the mean time to be of the good Behaviour: But after,

ter, upon the Petition of the Jurors, I took down their fines to 40 s. apiece, which they all paid, and enter'd in Recognizance, &c.

At the same Assizes at Winchester, the Clerk appointed by the Bishop to give Clergy to the Prisoners, being to give it to an old Thief; I directed him to deal clearly with me, and not to say legit in case he could not read; and thereupon he delivered the Book to him, and I perceived the Prisoner never look'd upon the Book at all, and yet the Bishop's Clerk, upon the demand of legit or non legit, answered legit; and thereupon I wished him to consider, and told him I doubted he was mistaken, and bid the Clerk of the Assizes ask him again, legit or non legit, and he answered again something angrily, legit; Then I bid the Clerk of the Assizes not to record it: And I told the Parson he was not the Judge whether he read or no, but a Ministerial Officer to make a true Report to the Court. And so I caused the Prisoner to be brought near, and delivered him the Book, and then the Prisoner confessed he could not read; whereupon I told the Parson he had reproached his Function, and unpreach'd more that day than he could preach up again in many days; And because it was his personal Offence and Misdemeanor, I fined him 5 Marks, and did not fine the Bishop, as in case he had failed to provide an Ordinary.

The Ordinary Fined. For saying the Prisoner did read when he could not, for endeavouring to abuse the Court.

My Brother Archer, upon Discourse, told me he well remembered the Case of Mr. Ford a Gent. in Grays Inn, who in the time when Sir Nich. Hyde was Chief Justice, was indicted of Murder in the King's Bench, and upon the Evidence, the case was that Mr. Ford with other Company, was in the Vine Tavern in Holborn, in a Room; and some other Company, bringing with them some Women of ill Fame, would needs have the Room where Mr. Ford was, and turn him out, to which Mr. Ford answered, that if they had civilly desired it, they might have had it, but he would not be turned out by force; and thereupon they drew their Swords on Mr. Ford, and his Company, and Mr. Ford drew his Sword, kill'd one of them, and it was adjudged justifiable.

Mr. Ford's Case; killing a Man in defence of his own possession of a Room in a Tavern justifiable.

Memorand. To inquire of this Case.

vid. Inst. C. de H. 294. note.

At

*Jones and Beyer's Case.*

At the Goal-delivery in the Old Baily, 19 February 1665, John Jones and Philip Beyer, were indicted for Burglary for breaking the King's House at Whitehal, and stealing from thence the Goods of the Lord Cornbury, and were found not Guilty. And after were indicted for the same Burglary, and stealing the Goods of Mr. Nunnesy: And we agreed that they being once acquitted for the Burglary, could not be indicted again for the same Burglary, but might be indicted for stealing the Goods of Mr. Nunnesy according as it was formerly resolved in Turner's Case. Vide ante. But in this case when we saw the Evidence not sufficient to prove the stealing of my Lord Cornbury's Goods, we might have discharged the Jury and so taken no Verdict; and then he might have been indicted for that Burglary, and stealing the Goods of Mr. Nunnesy.

Burglary, Country House and City House.

Memorandum, Mr. Lee, the Clerk of the Peace for London, then told me, that about twenty Years since in the Case of Mr. Gardiner, who was a Citizen, and had a House in the City where he usually lived in the Winter, and another House in the Country where he usually lived in Summer; and while he and his Family were in the Country, his House in the City was broken open in the Night, and his Goods stolen; no Person being in the House, and it was adjudged Burglary, for it was his Mansion House.

Principals in Murder, tho' absent.

Memorandum, That my Brother Twisden shewed me a Report which he had of a Charge given by Justice Jones to the Grand Jury at the King's-Bench-Bar in Michaelmas Term, 9 Car. 1. In which he said, that poisoning another was Murder at Common Law. And the Statute of 1 E. 6. was but declaratory of the Common Law, and an Affirmation of it. He cited Vaux and Ridley's Case. If one drinks Poison by the Provocation or Persuasion of another, and dieth of it, this is Murder in the Person that persuaded it. And he took this difference: If A. give Poison to J. S. to give to J. D. and J. S. knowing it to be Poison, give it to J. D. who taketh it in the absence of J. S. and dieth of it. In this Case J. S. who gave it to J. D. is Principal. And A. who gave the Poison to J. S. and was absent when it was taken, is but accessory before the



the Fact: But if A. buyeth Poison for J. S. and J. S. in the absence of A. taketh it, and dieth of it; In this case A. though he be absent, yet he is Principal: So it is if A. giveth Poison to B. to give unto C. and B. not knowing it to be Poison, but believing it to be a good Medicine, giveth it to C. who dieth of it; In this case A. who is absent is Principal, or else a Man should be murdered and there should be no Principal: For B. who knew nothing of the Poison, is in no fault, tho' he gave it to C. So if A. puts a Sword into the hand of a Mad-man, and bids him kill B. with it, and then A. goeth away, and the Mad man kills B. with the Sword as A. commanded him, this is Murder in A. tho' absent, and he is Principal: For it is no Crime in the Mad-man who did the Fact, by reason of his madness, and he said that this Case was lately before himself and Baron Trevor at the Assizes at Hereford. A Woman after she had two Daughters by her Husband, Eloped from him and lived with another Man. And afterwards one of her Daughters came to her, and she ask'd her how doth your Father, to which her Daughter answered, that he had a Cold, to which his Wife replied, here is a good Powder for him, give it him in his Posset; and on this the Daughter carried home the Powder, and told all this that her Mother had said to her, and to her other Sister, who in her absence gave the Powder to her Father in his Posset, of which he died. And he said, that upon Conference with all the Judges, it was resolved that the Wife was Principal in the Murder, and also the Man with whom she run away, he being proved to be advising in the Poison; but the two Daughters were in no fault, they both being ignorant of the Poison, and accordingly the Man was Hang'd, and the Mother Burnt.

Person absent  
Principal in  
Murder, where  
the Person who  
did the Fact is  
not Guilty, be-  
cause of Mad-  
ness.

Persons absent  
Principal in  
Murder.

Memorandum, That upon Saturday the 28 of April 1666 An. 18 Car. 2. All the Judges of England, viz. My self, J. K. Lord Chief Justice of the King's Bench; Sir Orl. Bridgeman, Lord Chief Justice of the Common Pleas. Sir Matthew Hales, Chief Baron of the Exchequer; My Brother Atkins, Brother Twisden, Brother Tyrell, Brother Turner, Brother Browne, Brother Windham, Brother Archer, Brother Raynsford, and Brother Morton, met together at Serjeant's Inn in Fleet-Street, to consider

Resolution of all  
the Judges, on  
occasion of the  
Trial of Lord  
Morely.

*Vide Moor's Rep. 621.* resolved by all the Judges, that on a Tryal by Peers the Prisoner cannot challenge any of the Peers that are return'd on his Jury. Habit of the Judges at the Tryal.

of such things as might in point of Law, fall out in the Tryal of the Lord Morly, who was on Monday to be Tryed by his Peers for a Murder, and we did all una voce resolve several things following, par. 1. first it was agreed that upon the Letter of the Lord High Steward directed to us, we were to attend at the Tryal in our Scarlet Robes, and the Chief Judges in their Collars of SS. which I did accordingly; but my Lord Bridgman was absent, being suddenly taken with the Gout, the Chief Baron had not his Collar of SS. having left it behind him in the Country; but we all were in Scarlet, but no body then had a Collar of SS. but my self, for the Reasons aforesaid.

If Advice asked in private of the Judges by the Peers.

2. It was resolved, that in case the Peers who are Tryers after the Evidence given, and the Prisoner withdrawn, and they gon to consult of their Verdict, should desire to speak with any of the Judges to have their Opinion upon any point of Law, that if the Lord Steward spoke to us to go, we should go to them; but when the Lords asked us any Question, we should not deliver any Opinion, but let them know we were not to deliver any private Opinion without conference with the rest of the Judges, and that to be done openly in Court: And this, notwithstanding the president in the Case of the Earl of Castlehaven, was thought prudent in regard of our selves, as well as for the avoiding Suspicion, which might grow by private Opinions, all Resolutions of Judges being always done in Publick.

If ask'd in Court by the High Steward in absence of Prisoner.

3. Although we were not all agreed in the President of the Lord Dacre's Case, cited by Sir E. Coke in the Pleas of the Crown, p. 29, & 30. that the Judges may deliver any Opinion in open Court, in the absence of the Prisoner; yet it was agreed, that if the Lord Steward should, in open Court, demand any of our Opinions in any thing, tho' in the absence of the Prisoner, we were to give an Answer to the Question the Lord High Steward should demand of us, we being call'd to assist the Court, and the demand of any Question in such case being refer'd to the Discretion of the High Steward.

4. It

4. It was resolved by us all, that in case any of the Witnesses which were examined before the Coroner, were dead or unable to Travel, and Oath made thereof, that then the examinations of such Witnesses, so dead or unable to Travel might be read, the Coroner first making Oath that such Examinations are the same which he took upon Oath, without any Addition or Alteration whatsoever.

Witnesses examined by the Coroner, dead or not able to Travel.

5. That in case Oath should be made that any Witness who had been examined by the Coroner, and was then absent, was detained by the means or procurement of the Prisoner, and the Opinion of the Judges asked whether such Examination might be read, we should answer, that if their Lordships were satisfied by the Evidence they had heard, that the Witness was detained by means or procurement of the Prisoner then the Examination might be read, but whether he was detained by the Means or Procurement of the Prisoner, was matter of Fact, of which we were not Judges, but their Lordships.

Witnesses detained by procurement of Prisoner.

6. Agreed, that if a Witness who was examined by the Coroner be absent, and Oath is made that they have used all their Endeavours to find him and cannot find him, that is not sufficient to authorize the reading of such Examination.

Witness sought for and not found.

7. Agreed, that no words, be they what they will, are in Law such a Provocation, as if a Man kill another for words only will diminish the Offence of killing a Man from Murder to be Manslaughter: As suppose one call another son of a Whore, or give him the Lie, and thereupon he to whom the words are given, kill the other, this is Murder. But if upon ill words, both the Parties suddenly Fight, and one kill the other, this is but Manslaughter, for it is a combat betwixt two upon a sudden heat, which is the legal description of Manslaughter; and we were all of Opinion that the Statute of 1 Jac. for stabbing a Man not having first struck, nor having any Weapon drawn, was only a Declaration of the Common Law, and made to prevent the inconveniences of Juries, who were apt to believe that to be a Provocation to extenuate a Murder, which in Law was not.

Words only, no Provocation to lessen the Offence of killing a Man from Murder to be Manslaughter.

Vide Crompton's Just. 23, a, b. Two to play at Tables and fall out suddenly, and one with a Dagger kill the other.

Agreed,



If there be a Quarrel, & a reasonable time before they Fight, it is Murder.

*V. Crompt. Just.*

23. Two fall out suddainly and fight presently, and one kill the other it is but Manslaughter; so if after they have quarrelled, they presently go into the Field and Fight, and one kills the other, 'tis but Manslaughter; (For all is one continued act of Fury. But if two fall out suddainly, and before any blows presently appoint to go to the Field and Fight, and one kill the other, this is Murder, because it appeareth by choosing a fit place to fight their Reason

was above their Passion, and so a deliberate act.

*Vide Crompt. Just. p. 25. accordant.*

\* A Peer cannot waive his Tryal by Peers.

Verdict of the greatest number, good if twelve.

8. Agreed, that if upon words two Men grow to anger, and afterwards they suppress that anger, and then fall into other Discourses, or have other Diversions for such a space of time as in reasonable intendment, their heat might be cooled, and some time after they draw one upon another, and Fight, and one is killed, this is Murder, because being attended with such Circumstances as it is reasonably supposed to be a deliberate act, and a premeditated Revenge upon the first Quarrel; but the Circumstances of such an act being matter of Fact, the Jury are Judges of those Circumstances.

This following Report I took out of Justice Spelman's Original Reports, which I had from Sir Jeffry Palmer Attorney General, which Report is cited, *Co. Pl. Cor.* 29 & 30.

The Lord Dacres's Case, who was indicted for Treason before Commissioners of Oyer and Terminer in the County of Cumberland, for adhering to the Scots, the King's Enemies, and tried by his Peers 26 H. 8. \* Thomas Duke of Norfolk being High Steward; and the day before all the Judges assembled to resolve certain Questions which might arise upon the said Tryal, so that if any Question should be asked them they might resolve una voce, and one Question was, whether the Prisoner might waive his Tryal by his Peers, and be tried by the Country, and they all agreed he could not. For the Statute of Magna Charta is in the Negative, *Nec super eum ibimus nisi per legale iudicium parium suorum*, this is at the King's Suit upon an Indictment.

2. It was agreed by most of the Judges, that if all the Peers do not agree in their Verdict, then the Verdict of the greatest part of them is a good Verdict, so that there be Twelve or more; (therefore the use is never to have less than twenty three Peers for Tryers, because that is the least number to be sure of twelve to be of one Mind.) And after the Prisoner was arraigned, and asked whether he was Guilty or not Guilty: He desired respite to consider, because the Indictment was long, and contained many things; but the High Steward told him, he must

must plead to the Treason, or else Judgment would be given against him as a Traitor, and thereupon he pleaded not Guilty. Then he was asked how he would be tried, and he took long time to consider, and would not have put himself upon his Peers; but at last the High Steward told him that he must give Judgment against him as a Traitor, unless he put himself upon his Peers, as against one who refused the Trial of Law; and thereupon he put himself for his Trial upon his Peers; and after Evidence was given, and the Prisoner withdrawn from the Bar, and the Lords gone to consider of their Verdict, they sent to the Lord Steward to speak with him; and he thereupon desired the Advice of the Judges; and they advised him that he could not do so unless the Prisoner was present at the Bar. And afterwards the Peers desired the Lord Steward that one Christopher Dacres, Uncle to the Lord Dacres, who was in the Tower for the same Treason, might be sent for to be examined, if the L. Dacres did command him to go to the Lord Maxie to treat with him in favour of the Scots: And the Lord Steward, by the advice of the Judges, told them, that could not be done, all the Evidence being given already, and also he was not a necessary Witness, being Uncle to the Prisoner, and not supposed that he would give Evidence against him, so after, in the absence of the Prisoner (as the Course is) the Lords gave the Verdict, and found him not guilty, and then the Prisoner was brought to the Bar, and the Lord Steward did rehearse the Verdict, and gave Judgment that he should be discharged paying his Fees.

The High-Steward not to speak to the Peers in the absence of the Prisoner.

And amongst the Judges, a Question was moved whether the Court might be adjourned to the next day, and they agreed it might, but it hath not been done.

Court may be adjourned.

Another Question was moved among them, that if the Peers did not agree, so that the Court was adjourned till the next day, what should be done with the Peers who were the Tryers? And some Judges held they were to be kept together all night, but others held, because they were not sworn, for the great Trust reposed in them, and presumed to be in them, they might go to their own Houses every one by him self.

If the Lords do not agree of their Verdict that day whether to be kept together, or go to their several Houses.

Q.

Ans.

Lords before whom the Indictment is found, may be Peers on the Tryal.

Another Question was moved among them, whether the Lords who were Commissioners, to enquire of the Treason, before whom the Prisoner was Indicted upon the Commission of Oyer and Terminer, might be Peers on the Tryal; and agreed by all that they might.

Murder notwithstanding flying to a Wall.

If A. hath Malice against B. and meeteth him and striketh him, and then B. draweth at A. and A. flyeth back until he come to a Wall, and then kills B. this is Murder, notwithstanding his flying to the Wall; for the craft of flying shall not excuse the Malice which he had, nor shall any such Device to wreak his Malice on another, and think to be excused by Law, avail him any thing, but in such Case the Malice is enquirable, and if that be found by the Jury, then his flight is so far from excusing the Crime, that it aggravates it, vide Crompt. Just. 22. b. Fitz Cor. 287. vide at the end of that Case, in Fitz Abridgment, Coron. 287. the Jurors were amerced for putting an under Value upon the Goods of a man who killed another in his own defence.

Jury undervalue Goods forfeited, they are amerced.

At a Goal Delivery at Newgate, 11th July 18 Car. 2. Tho. Johnson, John Girling, and Elizabeth Powell were indicted for breaking the House of Thomas Powell (his Wife then being in the House) and stealing away above 60 l. in Money. Upon the Evidence the Case was, that Powell kept an Ale-house, and Eliz. Powell was his Servant, and had seen her Mistress put Money into a Trunk in her Chamber, which was 2 pair of Stairs high and lock'd her Trunk; And this Servant combined with the two Men to rob her of the Money, and in order thereunto, those two Men came into the House to drink, and found fault with all the Rooms below Stairs, and so were had up two pair of Stairs, the next Chamber to that where the Money was, and the Maid came to them, and they broke up the Trunk, and took away above 60 l. in Money, and upon this Evidence, my self, and my Brother Twisden, and Brother Wyld being present, were of Opinion that to take away Clergy, there must be an actual breaking of the House. For if one come into a Tavern, or an Ale-house, and take any thing, the Law maketh them Trespassers ab initio; and so if they steal any thing, it is Felony.

What shall be a breaking of a House to take away Clergy.



Felony; yet this doth not make an actual breaking of the House; but in that Case, If they being in the House break open any Chamber-door and steal Goods, this is an actual breaking of the House, and taketh away Clergy; but the breaking open a Trunk or Box which is locked, and stealing any thing out of it, is no actual breaking of the House, because the Trunk or Box are no part of the House. But if they break open any thing which is fixed to the free-hold, as a Cupboard Door in a Wall, &c. this is an actual breaking of the House; and accordingly in the principal Case, the Men had there Clergy.

At a Goal-Deliberation at Newgate 25. April, 1666. 18 Car. 2. upon an Indictment of Murder against Hopkin Huggett, a special Verdict was found to this Effect. We find that John Berry, and two others with him, the Day and Place in the Inquisition had de facto, but without Warrant (for ought appears to us) impressed a Man whose Name is not yet known, to serve in his Majesties Service in the Wars against the Dutch Nation; That thereupon, after the unknown man was Impressed, he with the said John Berry, went together quietly into Cloth-fair; and the said Hopkin Huggett and three others, walking together in the Rounds in Smithfield, and seeing the said Berry and two others with the man impressed, going into Cloth-fair, instantly pursued after them, and overtaking Berry and the impress man, and the two other men required to see their Warrant, and Berry shewed them a Paper which Hopkin Huggett and the 3 others said was no Warrant; and immediately the said H. Huggett and the three others drew their Swords to rescue the said man Impress, and did thrust at the said John Berry; and thereupon the said John Berry and the two others with him did draw their Swords and fight together, and thereupon the said H. Huggett did give the Wound in the the Inquisition to the said John Berry, whereof he instantly died; and if upon the whole matter, the said H. Huggett be guilty of Murder they find so; If of Manslaughter they find so, &c. All the Judges of England being met together, at Serjeant's-Inn in Fleetstreet, upon other Occasions, (and before that time, having Copies of this special Verdict sent unto them) after the other business dispatched, they were desired to give their Opinions in this Case,

*Hopkin Huggett's Case for killing a Man.*

*Judges differ, if Murder or Manslaughter.*

Case, whether they held it to be Murder or Manslaughter. And the Lord Chief Justice Bridgeman, Lord Chief Baron Hales, my Brother Atkins, Brother Tyrell, Brother Turner, Brother Browne, Brother Archer, and Brother Rainsford, having had the Notes of the Special Verdict three days before, delivered their Opinion as then advised; but they said they would not be bound by it: That this was no Murder, but only Manslaughter; and they said, that if a man be unduly Arrested or restrained of his Liberty by three men, altho' he be quiet himself, and do not endeavour any Rescue, yet this is a Provocation to all other men of England, not only his Friends but Strangers also, for common Humanity sake, as my Lord Bridgeman said, to endeavour his Rescue; and if in such endeavour of Rescue they kill any one, this is no Murder, but only Manslaughter. And my Brother Browne seemed to rely on a Case in Coke 12. Rep. p. 87. where divers men were playing at Bowls, and two of them fell out and quarrelled, one with another, and a third man who had no Quarrel, in revenge of his Friend struck the other with a Bowl, of which blow he died, this was held to be only Manslaughter. But my self, Brother Twisden, Brother Wyndham, and Brother Morton, were of another Opinion; and we held it to be a Murder, because there was (as we thought) no provocation at all. And if one man assault another without Provocation, and kill him, this is Murder; the Law in that Case implying Malice. And we find it was resolved by all the Judges in the Lord Morley's Case, that no Words, be they what they will, were such a Provocation in Law, as if upon them one kills another would diminish or lessen the Offence from being Murder, to be but Manslaughter. As if one calleth another Son of a Whore, and giveth him the Lie, and upon those Words the other kill him that gave the Words, this notwithstanding those Words, is Murder; and we thought those Words were apter to provoke a man to kill another, than the bare seeing a man to be unduly pressed when the Party pressed willingly renders himself. But we held that such a provocation as must take off the killing of a man from Murder to be but Manslaughter, must be some open Violence, or actual striving with, or striking one another; and that answers the Case cited by my

*Vide Lord Morley's Case.*

Bro-

Brother Browne. For there it must be intended that the Two men that fell out were actually fighting together; for if there passed only Words betwixt these Two, and upon them, a third Person struck one of them with a Bowl, and killed him, we held that to be Murder. And to this my Lord Bridgman and the other Judges agreed, and we thought the Case in question to be much the stronger, because the Party himself who was impressed was quiet, and made no Resistance, and they who medled were no Friends of his, or Acquaintance, but were Strangers, and did not so much as desire them which had him in Custody to let him go, but presently without more ado, drew their Swords at them, and ran at them. And we thought it to be of dangerous Consequence to give any Encouragement to private men to take upon themselves to be the Assertors of other men's Liberties, and to become Patrons to rescue them from Wrong; especially in a Nation where good Laws are for the Punishment of all such Injuries, and one great end of Law is to right men by peaceable means, and to discountenance all Endeavours to right themselves, much less other men by Force.

Secondly, We four were of Opinion, that if A. assault B. without any provocation, and draw his Sword at him, and run at him; and then B. to defend himself draw his Sword, and they fight together: If A. kill B. it is Murder, and B. drawing his Sword to defend himself shall not lessen the Offence of A. from being Murder, to be Manslaughter only: And to this the other Judges did (as I take it agree.) For it were unreasonable, that if one man draw upon another, and run at him without any Provocation that the other man should stand still, and not defend himself, and it is also unreasonable that his endeavour to defend himself should lessen the Offence of him who set upon him without provocation.

But we four held, that if two men be quarrelling, and actually fighting together, and another man runneth in to aid one of them and kill the other, this is but Manslaughter, because there was an actual fighting and striving with violence.



So we held, If such People who are called Spirits take up a Youth, or other Person to carry him away, and thereupon there is a Tumult raised, and several Persons run in, and there is a man killed in the Fray, this is but Manslaughter: For there is an open assay, and actual force, which is a sudden provocation, and so that death which ensueth is but Manslaughter. But where People are at Peace, there if another man upon suspicion that an Injury is done to one of them, will assault and kill him whom he thinketh did the Injury, this is Murder, so that we hold nothing but an open Assay or striking can be a Provocation to any Person to meddle with an Injury done to another, if in that meddling he kill a man, to diminish or lessen the offence from Murder to Manslaughter.

Memorandum, After this difference I granted a Cerci-orari to remove the Cause into the King's-Bench, to be argued there, and to receive a final and legal Determination; and altho' all the Judges of the Court were clearly of Opinion that it was Murder, yet it being in Case of Life, we did not think it prudent to give him Judgment of Death, but admitted him to his Clergy; and after he read, and was burnt in the Hand, we ordered him to lie in Prison Eleven Months without bail, and afterwards until he found Sureties to be of the good Behaviour during his Life.

Cassey and Cot-  
ter's Case.

Robbery and  
Burglary by  
Fraud.

Vide Cok. Pl. Cor.  
64. pretence of  
Huy and Cry.

At the Goal-delivery in the Old Baily, 10. Oct. 1666. Tho. Cassey, and John Cotter, were Indicted for robbing William Pinkney, a Goldsmith by the Templebar, in his House near the High-way in the Night time, and stealing several Parcels of Plate, and other things from him. And they were also Indicted for the same Offence for Burglary for breaking his House in the Night, and stealing his Plate, &c. and on both these Indictments they were arraigned and tryed, and upon the Evidence the Case appeared to be that Cotter was a Lodger in the House of the said Pinkney, and knowing that he had Plate and Money to a good value, he combined with the aforesaid Cassey, and one John Harrington, and Gerrard Cleashard, and

and they three contrived that one of those three should come as Servant of the other to hire Lodgings there, for his Master and another Gentleman; and Cotter told them, that Pinkney was one who constantly kept Prayers every Night, and they could not have so good an Opportunity to surprize him as to desire to joyn in Prayer with him, and at that time to call on him and his Maid, there being then no other Company in the House; and accordingly one of them came on Saturday in the Afternoon, and hired Lodgings there, pretending it to be for his Master and another Gentleman of good Quality, and about Eight a Clock at Night they all came thither, two of them being in very good Habit, and when they were in their Chamber they sent for Ale, and desired Pinkney to drink with them, which he did; and while they were drinking, Cotter came in to his Lodging, and they hearing one go up Stairs, asked who it was, and Pinkney told them it was an honest Gentleman, one Mr. Cotter, who lodged in his House, and they desired to be acquainted with him, and that he might be desired to come to them; And thereupon Pinkney sent his Maid to him to let him know the Gentlemen desired to be acquainted with him, to which Cotter sent word it was late, the next day was the Sabbath, and he desired to be private, and thereupon those Persons told Pinkney they had heard he was a Religious man, and used to Perform Family Duties, in which they desired to joyn with him. At which Pinkney was very well pleased that he had got such Religious Persons, and so called to Prayers, and while he was at his Devotion they rose up, and bound him and his Servant, and then Cotter came to them, and shewed them where his Money and Place lay, and they ransackt the House, and broke open several Doors and Cupboards first to the house; and upon this Evidence my self, my Brother Wylde, Recorder, and Mr. Howell, Deputy Recorder, being all who were there present of the Long Robe, were of Opinion that the Entrance into his House being gain'd by fraud, with an Intent to rob, and they making use of this Entrance, thus fraudulently obtained as in the night time to break open Doors, &c. this was Burglary, agreeable to the Case of Farr in this Book, and the Case of Mr. Lemott, in this Book, and accordingly they

*Ante 42, 3.*

they were found guilty, and had Judgment, and were executed.

*Grey's Case for killing his Apprentice.*

At the same Sessions John Grey being indicted for the Murder of William Golden, the Jury found a Special Verdict to this effect, viz. We find that the Day, Year, and Place in the Indictment mentioned John Grey, the Prisoner was a Blacksmith, and that William Golden, the Person killed was his Servant, and that Grey his Master commanded him to mend certain Stamps, being part belonging to his Trade, which he neglected to do; And the said Grey his Master after coming in asked him the said Golding, why he had not done it, and then the said Grey told the said Golding, that if he would not serve him, he should serve in Bridewel, to which the said Golding reply'd, that he had as good serve in Bridewel as serve the said Grey his Master; whereupon the said Grey, without any other Provocation, struck the said Golding with a Bar of Iron, which the said Grey then had in his hand, upon which he and Golding were working at the Anvil, and with the said blow he broke his Skull, of which he died; and if this be Murder, &c. This Case was found Specially by the desire of my Brother Wyldc, and I shewed the Special Verdict to all my Brethren, Judges of the King's Bench, and to my Lord Bridgman Chief Justice of the Common Pleas. And we were all of Opinion that this was Murder. For if a Father, Master, or Schoolmaster, will correct his Child, Servant, or Scholar, they must do it with such things as are fit for Correction, and not with such Instruments as may probably kill them. For otherwise, under pretence of correction, a Parent might kill his Child, or a Master his Servant, or a Schoolmaster his Scholar, and a Bar of Iron is no Instrument for Correction. It is all one as if he had run him through with a Sword; and my Brother Morton said he remembered a Case at Oxford Assizes before Justice Jones, then Judge of Assize, where a Smith being chiding with his Servant, upon some cross answer given by his Servant, he having a piece of hot Iron in his hand, run it into his Servants Belly, and it was judged Murder, and the Party executed. And my Lord Bridgman said, that in his Circuit there was a Woman indicted for murdering her Child, and it appeared upon the Evidence, that she kickt her and stampt upon her Belly, and he judged

*Vide Dalton*  
278. a case cited  
to be before Ju-  
stice *Walmsly*,  
43 El. At *Staff-*  
*ford* Assizes,  
where on words  
twixt Husband  
and Wife, he  
suddenly struck  
her with a Pestle  
and kill'd her,  
and it was ad-  
judged Murder;  
yet a Husband  
by Law may  
correct, but the  
Pestle was not  
an Instrument  
to correct with-  
al.



judged it Murder: And my Brother Twisden said, he rul'd such a Case formerly in Gloucester Circuit, for a piece of Iron or a Sword, or a great Cudgel, with which a Man probably may be slain, are not Instruments of Correction. And therefore when a Master strikes his Servant willingly with such things as those are, if Death ensue, the Law shall judge it Malice prepence, and therefore the Statute of 5 H. 4. c. 5. which Enacts, that if any one does cut out the Tongue, or put out the Eyes of any of the King's Subjects of Malice prepence, it shall be Felony. If a Man do cut out the Tongue of another Man voluntarily, the Law judgeth it of Malice prepence. And somewhere one Man killeth another without any Provocation, the Law judgeth it Malice prepence; and in the L. Morley's Case in this Book, it was resolved by all the Judges, that words are no Provocation to lessen the Offence from being Murder, if one Man kill another upon ill words given to him. But if a Parent, Master, or Schoolmaster, correct his Child, Servant, or Scholler, with such things as are usual and fit for correction, and they happen to die, Poulton de pace, pag. 120. saith this is by Misadventure, and cites for Authority, Kelloway 108, a, b, & 136, a. But that Book which puts this Case in Kelloway is 136, a. saith, that if a Master correct his Servant, or Lord his Vassal, and by force of that Correction he dieth, although he did not intend to kill him, yet this is Felony, because they ought to govern themselves in their Correction in such ways that such a Misadventure might not happen. And I suppose, because the word Misadventure is there used, therefore Poulton concludeth (it may be truly) that it is but Misadventure.

*Vide Coke Pl. Cor. in his Chapter for cutting out Tongues.*

It is but Misadventure in this Case if death ensue upon Correction, if it be with such things as are usual to correct withal. *Vide Dalton's Justice of Peace. last Edition 285. Books cited to this purpose.*

And in this Principal Case, upon Certificate many Persons of good Commendation of the general esteem that Grey had, I did Certifie the King, that tho' in strictness of Law, his Offence was Murder; yet it was attended with such Circumstances as might render the Person an Object of his Majesty's Grace and Pardon, he having a very good Report among all his own Company of his own Trade, and and of all his Neighbours, and upon this the King was pleased to grant him his Pardon.

One Slain in  
endeavouring to  
part two fight-  
ing where it is  
Murder.

At the Sessions in the Old Baily holden after Hillary Term, Caroli Secundi, Thomas Tomson was indicted for murdering of Allen Dawes, and the Jury found a Special Verdict to this Effect, viz. that the Day, Year, and place in the Indictment mentioned, Thomas Tomson, the Prisoner and his Wife, were fighting in the House of the said Allen Dawes, who was kill'd, and the said Allen Dawes seeing them fighting, came in and endeavoured to part them, and thereupon the said Tomson thrust away the said Dawes, and threw him down upon a piece of Iron, which was a Bar in a Chimney, which kept up the Fire, and by that one of the Ribs of the said Dawes was broken, of which he died; and if the Court judge this Murder, they find so, or if Man-slaughter, then they find so.

And I put this Case to my Lord Chief Justice Baron Hales and my Brother, and some other of my Brethren, and we all agreed as it is resolved in Young's Case, Co. 4. Report, and also in Mackally's Case, Co. 9. Report, that if upon a sudden Affray, a Constable or Watchman, or any that come in aid of them, who endeavour to part them, are killed, this is Murder; and we hold likewise, that if no Constable or Watchman be there, if any other Person come to part them, and he be kill'd, this is Murder: For every one in such case is bound to aid and preserve the King's Peace. But in all those Cases it is necessary that the Party who was fighting and kill'd him that came to part them, did know or had notice given, that they came for that purpose. As for the Constable or other Person who cometh to part them, to charge them in the King's Name to keep the King's Peace, by which they have notice of their intents; for otherwise if two are fighting, and a Stranger runs in with intent to part them, yet the Party who is fighting, may think he cometh in aid of the other with whom he is fighting, unless some such notice be given as aforesaid, that he was a Constable, and came to part them: And that appeareth by Mackally's Case before cited, where in case of an Arrest by a Serjeant, it is necessary to make it Murder that the Serjeant tell him that he doth Arrest, for else if he doth say nothing, but fall upon the man and be killed by him, this is

Vide. Lambert.  
Fitzherbert Fol.  
262. Dyer 128.

is but Manslaughter, unless it appear that the Person arrested did know him to be a Serjeant, and that he came to arrest him; for as the case is there put, if one seeing the Sheriff or a Serjeant whom he knoweth hath a Warrant to Arrest him, and to prevent it before the Officer come so near as to let him know he doth Arrest him, he shoots again at him, and kills him, this is Murder; and in the Principal Case tho' the Jury find that Dawes came to part the Man and Wife, yet it doth not appear whether it is found that Tomson knew his intent, nor that Dawes spake any words whereby he might understand his Intention, as charging them to keep the King's Peace, &c. And so we held it to be only Manslaughter, which in Law is properly Chance-medly, that is where one Man upon a sudden occasion kills another without malice in fact, or malice implied by Law.

If a Person in the Night time break a House, and steal Goods, this is Burglary, tho' no Person be at that time in the House. So if a Man hath two Houses, one in the City and another in the Country, and while he is in the one House the other is broken open, no body being in it, and Goods stolen, this is Burglary, Popham's Reports 42 and 512 by all the Judges.

A Servant in the House lodging in a Room remote from his Master in the Night time, draweth the Latch of a Door to come into his Master's Chamber, with an intent to kill him, this on a Special Verdict agreed by all the Judges to be Burglary.

Note, That in Popham's Reports, 84. In one Baynes's Case, it is said, that the said Baynes with another coming in the Night time to a Tavern to drink, the said Baynes stole a Cup in which they drank out, of a Chamber in the said House, his Wife and Servant being in the said House, for which he was indicted and found Guilty; and it is there reported, that by the Opinion of Anderson, Popham, and Periam, and the then Recorder and Serjeant at Law there present, it was agreed that this was no Burglary; which certainly is good Law, because there was no actual breaking of the House, which is of necessity to make a

Burglary, tho' no Person be in the House.

Burglary by a Servant in his Masters House, drawing a Latch of a Door is an actual breaking an House.

To make a Robbery of a House within the Stat.

23 H. 8. cap. 1 & 5 E. 6. c. 9.

take any Clergy away, there must either be an actual breaking of the House, or such a violence to some Person there that they are put in fear or dread.

Vid. my Reasons for it in this Discourse, for which I hold the last Resolution in Barnes's Case to be no Law.

Burglary.



**Burglary.** Vide Co. Pl. Cor. 64. But in that Case of Baynes, it is there said, that it was resolved by them there likewise, that that stealing was such a Robbery for which he was ousted of the benefit of his Clergy by the Statute of 5 E. 6. cap. 9. and was hang'd, which last Resolution I hold clearly not to be Law; for that that Stat. of 5 Ed. 6. c. 9. is only to enlarge the Stat. 23 H. 8. c. 1. which amongst other Crimes took away Clergy from such Persons who robb'd any in their Houses, their Wives, Children, or Servants being there, and put in fear or dread. Now that Stat. of 5 Ed. 6. ordaineth that altho' the Persons who were in the House, lay in some other part of the House, which was robbed, and were asleep at the time, and so did not hear the Thieves, and consequently were not put in fear, yet that Statute taketh away Clergy in that case; But notwithstanding there must be a Robbery, for both the Stat. of 5 Ed. 6. and the Stat. of 23 H. 8. is against such as shall rob Men in their Dwelling Houses. Now the taking away of a Cup in which Men are drinking, as Baynes's Case was, is only Larceny and no Robbery, for Larceny is described to be a fraudulent taking away of anothe Man's Goods above the value of 12d. with an intent to steal them, Poulton de pace 125, b. and Stamford Pl. Cor. 24, a. But Robbery is described to be a rapine, that is, a violent taking any thing from a Man's Person; and when it is applied to robbing of Houses, there must be the same Circumstance of force. Vide Poulton de pace 128. Stamford Pl. Cor. 27, a, b. Co. Pl. Cor. 68. For of necessity there must be something to distinguish a Robbery in a House, from that which is but a mere Larceny, and that is one, viz. The Larceny is only fraudulent without any actual force, and a Robbery is done with force; and this will appear by examining the nature of Burglary, which is the robbing a House by Night, there must be force committed, as the actual breaking of a House makes it Burglary: For if the Door of a House be open, and a Thief enter in the Night and steal Goods, this is only Larceny, and no Burglary, because there was no force, which is that which distinguisheth Robbery from Larceny. Now this force, which will make a robbery of a House within those Statutes to take away Clergy, may either be

be an actual breaking of the house, or an Assault upon the Person. And therefore if Company come to drink in a Tavern, or other Aleualling-house, and being there they break open a Door of another Chamber or Cubbord in the Hall which is fixed to the free hold, and steal away Goods, this is a Robbery, for which Clergy is taken away by those Statutes. But the breaking open a Trunk or Box, and taking away things is no Robbery of a House within the Statute, because those things which were broken were no part of the House: And so likewise it is in case of Violence offered to the Person of a Man, and taking away his Goods with force. As in case a Thief cometh into a Man's House or Shop, the Door being open, and assaults the honest Man in the House or Shop, and taketh away things by Violence, this is likewise a robbing of a House within those Statutes, but if in those cases he had come into the House or Shop, and privately stole away any thing, that had been only Larceny, and not Robbery: And this exposition agreeth with the sense of the Parliament in the Statute of 39 Eliz. c. 15. which expounds robbing of Houses in the day time to be the actual breaking them; for all former Statutes took away Clergy where a House was robbed in the day time, some Person being then in the House; but this Statute of 39 Eliz. recites the mischief, because Robbing of Houses when no Person was therein, was not so penal as Robbing them when some Person was therein, and thereby bad Persons took opportunity to commit many Robberies in Houses when People were gone abroad to hear Divine Service, or gone to their Labour, and declareth that that Robbery was, viz. by breaking and entering into Mens Houses at such time, and enacts that such robbing of any House, and stealing from thence Goods of the value of 5 s. they shall not have the benefit of the Clergy, which I think is a full exposition that robbing of Houses; in that case, must be an actual breaking, that is, an actual force committed in breaking of the House; but in the other case that I put of robbing a Man in his House by assault upon his Person, as where a Thief enters the House or Shop of a Man without any actual breaking, the Door being open, and by violence takes away his Goods, In that Case I conceive the Indictment must express that he

And the Stat.  
1 E. 6. c. 12.  
calls that break-  
ing of Houses,  
which the Stat.  
23 H. 8 & 5 E.  
6. calls robbing  
of Houses, and  
so expounds  
them.

did assault him and put him in fear, because that Circumstance is necessary to be laid to make it a Robbery from a Man's Person, and therefore 5 Eliz. Dyer 224, b. One being indicted for taking of Money from the Person of a Man by the High-way, had his Clergy, because it was not laid that he was put in fear, and the Book saith quod non est robberia if the Person be not put in fear, altho' Goods be taken from his Person: And for that Cause was the Statute of 8 Eliz. cap. 4. made to take away Clergy from him who privately taketh away any Money or Goods from the Person of a Man. If Thieves come into a House by Night, the Door being open, and take away Goods, this is no Burglary, as hath been said before. But in that case, if they put any in the House in fear and dread, and take away Goods, I hold this to be robbery of a House, for which the Thieves are ousted of Clergy by the Statute of 23 H. 8. cap. 1. If the Indictment be laid, that they put those in the House in fear and dread, and that be proved upon the Evidence,

*Messenger, Appletree, Basely, Green, and others indicted for levying War and pulling down Bawdy-houses, and breaking open Prisons.*

Memorandum, That at the Sessions at the Old Baily, after Easter in the twentieth Year of King Charles the 2d. Several dissolute Persons having on Easter Tuesday and Wednesday next before assembled together, and led by Persons whom they called Captains, and having Colours, viz. Aprons, &c. on Staves, went to several places on pretence to pull down Bawdy-houses, and break open Prisons and set Prisoners at Liberty, and having actually pull'd down some Houses, and broke up the Prison at Clerken-well, and let out four Prisoners there, were by the direction of the King's Council, viz. Mr. Attorney, Sir Jeffery Palmer, having Order to proceed against them, he directed four Indictments to be prefer'd against them, who were taken, viz. one Indictment against Peter Messenger, Richard Basely, William Green, and Thomas Appletree, and another Indictment against Edward Cotton, and a third against Edward Bedell and Richard Lattimer, and a fourth against Thomas Limerick. All the Indictments were, that they with other Persons to the number of 500, unknown to the Jurors, being armed in a War-like manner with Swords, half Pikes, Halberts, long Staves, and other Armes Offensive and Defensive with force and Arms



Arms unlawfully, and traitterously assembled themselves together, and levied War against the King, &c. And first I told them they had not done well to make so many several Indictments, for by that means the King's Evidence would be broken, whereas if all had been put into one Indictment, the Evidence as to the main Design would have been intire against all, and then the assembling in several places to the same intent had made the matter more foul, and would have been aptly given in Evidence against them all to the same Jury, and the several acts which each of them did, would have come in better; but however we proceeded upon the Indictments as they were, and after the Evidence given against the four in the first Indictment, when I came to give Directions to the Jury, I told them that altho' I was well satisfied in my own Judgment, that such assembling together as was proved, and the pulling down of Houses upon pretence they were Bawdy-houses, was High Treason, because they took upon them regal Power to reform that which belong'd to the King by his Law and Justices to correct and reform; And it would be a strange way and mischievous to all People to have such a rude rabble without an Indictment to proceed in that manner against all Persons Houses which they would call Bawdy-houses, for then no Man were safe, therefore as that way tore the Government out of the King's Hands, so it destroyed the great privilege of the People, which is not to be proceeded against, but upon an Indictment first found by a Grand Jury, and after upon a legal Tryal by another Jury where the Party accused was heard to make his defence; yet I told them, because the Kings of this Nation had oftentimes been so merciful as when such Outrages had been heretofore done not to proceed capitally against the Offenders, but to proceed against the Offenders in the Star-Chamber, being willing to reduce their People by milder ways if it were possible to their Duty and Obedience; yet that lenity of the King in some Cases did not hinder the King when he saw there was need to proceed in a severer way, to take that course which was warranted by Law, and to make greater Examples, that the People may know the Law, is not wanting so far to the safety of the King and his People, as to let such Outrages go without capital Punishment, which is at this time absolutely necessary, be-  
cause

cause we our selves have seen a Rebellion raised by gathering People together upon fairer Pretences than this was, for no such Persons use at first to declare their wickedest Design, but when they see that they may effect their Design, then they will not stick to go further, and give the Law themselves, and destroy all that oppose them: But yet because there was no body of the Long Robe there but my Brother Wylde, then Recorder of London, and my self, and that this Example might have the greater Authority, I did resolve that the Jury should find the matter Specially, and then I would procure a meeting of all the Judges of England, and what was done should be by their Opinion, that so this Question might have such a Resolution as no Person afterwards should have reason to doubt the Law, and all Persons might be warned how they for the time to come mingle themselves with such Rabble on any kind of such Pretences, and thereupon the Jury as to the first four in the first Indictment gave a Special Verdict to this Effect, viz.

A Special Verdict as to Messenger, Appletree, Basely and Green.

They find that the 24th of March last, a great number of Persons to the number mentioned in the Indictment were assembled together in East-smith field and Moor Fields in the County of Middlesex with Arms mentioned in the Indictment, on pretence of pulling down Bawdy-houses that Basely led them, and was called their Captain, and had in his hand a naked Sword which he brandished over his head, and that Messenger had a piece of Green Apron on a Staff, which he flourished as Colours in the head of the Company, and that Basely, and he led the Company as their Leaders; that they did the like on Wednesday the 25th of March, and were breaking down Houses. That Peverell, one of the Constables of Middlesex, having a Constable's Staff in his hand, came to them with other Persons to aid him, and charged them to depart and keep the Peace, and thereupon, Basely with his Sword struck him, and wounded him, and several Persons assembled with him, struck him down, and took away his Constables Staff. That the said William Green was among them casting up his Cap, and hollowing with a Staff in his hand, and that whilst he was amongst them he was knocked down by a Party of the King's Soldiers that

that came to suppress them, and was then taken. That Basely struck at the Ensign that led those Soldiers: That the said Appletree was amongst them both Daves, and was the first that struck at Peverell the Constable, and was amongst them at Burlingham's House at Saffron-hill in the County of Middlesex, and pull'd part of the House down, and the next House to it, and struck at one that admonished him to be quiet. And if on the whole matter, it shall seem to the Court that they are guilty of the Offence mentioned in the Indictment, then they find them Guilty, &c.

On the 2d. Indictment as to Cotton alone, the Jury did find that at the time and place mentioned in the Indictment, a great number of Persons, to the number mentioned in the Indictment, met together Armed with Swords, Clubs, Staves, and other Weapons, under pretence of pulling down Bawdyhouses, and had a Cloth on a Staff for an Ensign carried before them. And that Sir Phillip Howard, with a Troop of the K's. Guard, found them armed in such seditious manner, and commanded them to disperse, that they refused so to do, and threw Stones at him, that some of them enquired who it was that led those Guards, whether it was the Duke of York, and being told it was, they presently threw Stones at Sir P. H. who led the Horse, and some of them said that unless the King would give them liberty of Conscience, May Day should be a bloody day, others bid kill the Guards, and others said, that they would come and pull down Whitehal, and others said they would be with them at Whitehal, (the King's Capital Palace) and that they cared not for the Guards, for they were but 2 or 300, and they could easily knock them on the Head; that they continued many Hours till they were dispersed by the Guards. That Cotton who was indicted, was one of them assembled in this manner, and that Cotton was amongst them the next day when they were assembled in the same manner, and was pulling down a House in the Parish of St. Leonard Shoreditch in the County of Middlesex; and if on the whole matter, &c.

Special Verdict  
also as to Cotton.

Special Verdict  
on the third Indictment.

Bedell and Lattimer.

On the third Indictment against Bedell and Lattimer, the Jury find that the day and place mentioned in the Indictment, a great number of Persons to the number mentioned

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tioned in the Indictment armed as in the Indictment, did meet together in Clerkenwell-Green in the County of Middlesex, on pretence of breaking open Prisons, and releasing Prisoners; that one of them who had a half Pike in his hand, owned himself to be their Captain; that they came so assembled together to a place there called the New Prison, being a publick Prison of the County of Middlesex, and then and there said, that they came to search for Prisoners, and brake open the Prison Doors, and let out four Prisoners, two whereof were committed thither for Felony, and two for other Offences, and that they being charged to depart, replied, they had been Servants long, but now they would be Masters; that some being taken, they cryed one die and all die: That Latimer was amongst them, and active in breaking of the Prison, and was with the rest in the Prison after it was broken open; And that Bedell was there, and being pursued by one of the King's Soldiers, called out to the rest of the Company to face about, and not to leave him, and if on the whole, &c.

Special Verdict  
as to *Lymerrick*.

On the fourth Indictment against Lymerrick, the Jury find that the Day, Year, and place in the Indictment mentioned, a great number of Persons to the number, &c. assembled together on pretence of pulling down of Bawdy-houses, and being armed prout in the Indictment, they marched in Warlike manner, and the said Lymerrick led them as their Captain with a Club in his hand, and was owned by the Company to be their Captain: That the said Lymerrick had the said Persons to the House of Peter Burlingham, and they pulled down the said House, and destroyed and took away divers Goods of the said Burlingham's, to the value of 30*l*. And if on the whole matter, &c.

And in Easter Term following, all the Judges met at my Chamber, there being then but eleven. My Lord Bridgeman, who was Chief Justice of the Common Pleas being then Lord Keeper, the Judges were my self, Chief Justice of the King's Bench, Sir M. Hales the Chief Baron, and my Brother Atkins, Brother Twisden, Brother Tyrell, Brother Turner, Brother Wyndham, Brother Archer, Brother Rainsford, Brother Morton, and Brother Wyld.

And

And on the whole matter the Chief Baron Hales delibered his Opinion, that there was no Treason in the case, because he said that the Stat. 1 Q. Mary, cap. 12. is, that if any Persons to the number of Twelve or more assemble to the intent to pull down Enclosures, &c. with force, and continue together an hour after Proclamation made for their departure it shall be felony, and if those Actions had been Treason at Common Law, it had been to no purpose to make it felony.

But all the other Judges answered, that this was the Objection made by some Judges in the Case of Bradshaw and Burton, which is reported by Popham in his Reports, p. 122. And there it was resolved, that if any Persons assembled with force to alter the Laws, or to set a price on Officials, or to lay violent hands on the Magistrate as on the Mayor of London and the like, and with force attempt to put the same in Execution, this is Rebellion and Treason at the Common Law; and they there resolved that that Statute of 1 Mary was to be intended where Persons to the number of Twelve or more pretending any or all of them to be injured in particular, as by Reason of their Common or other Interest in the Land inclosed, and the like, assemble to pull it down forcibly in cases where they have an Interest, or where in particular, they are annoyed or grieved, that is not Treason: But in case their Act goeth generally to pull down Inclosures in which they, or any of them are not particularly concerned, this Act if it be put in Execution by force is Treason at Common Law. And it was agreed by us all, that the Stat. of 13 Eliz. which maketh the intention in many cases Treason, extends to nothing, but where if the Act had been done it had been Treason at the Common Law.

And therefore all the rest of the Judges did unanimously agree that this rising with intent to pull down Badwy-houses in general, or to break open Prisons in general and let out Prisoners, and putting their Intention in Execution by force, any of these instances was a levying War

War against the King, and High Treason at Common Law within the Declaration of the Stat. of 25 E. 3. And for that, besides the Resolution in Popham's Reports before cited, we considered the case of the Apprentices Reported in the second part of Anderson's Reports, pag. 4 & 5. where it was resolved that by the Statute of 13 Eliz. If any intend to levy War for any thing which the Queen by her Laws and Justice ought to do, and reform in Government as Queen, this shall be an intendment to levy War against the Queen within that Statute of 13 Eliz. And as we said before, nothing can be Treason by the intention within the Statute which had not been Treason by the Common Law, if it had been actually put in Execution. And see the same Book of Anderson second part 66, and by the case of several Persons in Oxfordshire rising to pull down Inclosures in general, resolved accordingly, in which Case it was also resolved, that if any Persons rise and Assemble together, with intent to levy War, the Justices of the Peace and Sheriffs may use force to suppress such Rebels without any Special Commission or Warrant, and this by the Common Law: And see Popham's Reports 121, and a Resolution of all the Judges, 39 Eliz. that any Justice of the Peace, Sheriff, or other Magistrate, or any other Subject of the King may by the Common Law Arm themselves to suppress Riots, Rebellions, or resist Enemies and endeavours themselves to suppress such disturbers of the Peace: But they said the most discreet way was for every one to attend and assist the Justices in such case, or other Ministers of the K. in doing of it, and Cook Pl. Cor. 9. If any levy War to expulse Strangers, to deliver Men out of Prison, to remove Councillors, or to any other end pretending Reformation on their own heads without Warrant, this is a levying of War against the King, because they took upon them Royal Authority. And Moor's Reports, pag. 620, 621. in the case of the Earl of Essex, in which amongst other things it was resolved, that his attempt with force to remove the Queen's Councillors was High Treason, and likewise that the Earl of Southampton, who adhered to him, altho' he knew of no other purpose of the Earl of Essex, but a private Quarrel against some of the Queen's Servants, yet this was Treason in him,

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the Act of the C. of Essex being Rebellion and Treason, and so it was also Resolved, that all those who went with him out of Essex-house in aid of him, it was Treason in them, whether they knew any thing of his Intent or not, and Cro. 1st. part p. 583. In Benstead's Case, it was resolved by all the Judges, that going to Lambeth House in Warlike manner with Drums, and a multitude as in the Indictment, to the number of 300, &c. to Surprize the Arch-Bishop, who was a Privy Counsellor, was Treason. And 2ly, it was resolved that the Justices of Oyer and Terminer, may sit, enquire and try Prisoners all in one day. 3dly. It was resolved, that the breaking of a Prison wherein Traitors were in durance, and causing them to Escape, was Treason, altho' the Parties did not know that Traitors were there. And so to break a Prison whereby Felons escape, this is Felony, tho' they do not know them to be in Prison for such Offence. Note, That Resolution as to breaking a Prison where Felons, &c. are must, (as I think) be intended only where the Intent was only to break open one Prison and no more, for if the Design was to break open Prisons in general, and they put that in Execution as to one Prison, that is High Treason according to the Books before cited; But then on the Evidence it must be proved that their Intent was such, and by such proof as satisfieth the Jury.

After this Resolution in general, we went to consider the particular Cases as they were found upon the several Special Verdicts; and thereupon it was agreed by all of us, except the Chief Baron, who said he doubted on the main, that as to Messenger and Basely in the first Verdict, and to Cotton in the second Special Verdict; and as to Lymerick in the fourth Special Verdict, that the matter as it was found against these four, was High Treason in them all, and accordingly they had Judgment, and were executed: But as to Appletree in the first Special Verdict; And as to Latimer in the third Special Verdict there was difference

in Opinion amongst us, whether the Verdict was sufficiently found against them to judge it High Treason or not. For besides the Chief Baron who was against all, my Brother Ackins, Tyrell, Windham, and Wyld, held that the Verdict was not sufficient against those two for to give Judgment that they were guilty of Treason, because they said it was not expressly found, that they were aiding and assisting: But my self, Brother Turner, Twisden, Archer, Raynsford, and Moreton, thought the Verdict as it was found against them to be as full and plain as any of the rest. For first as to Appletree, the Verdict first finds in general, that the number in the Indictment were assembled, as in the Indictment, with an intent to pull down Bawdy-houses; that Basely led them as their Captain, that Messenger had a Green Apron upon a Staff, which he flourished as Colours, and then that Appletree, the Person now in Question, was amongst them both the Days, and was the first that struck at Peverell the Constable, and was amongst them at Burlingham's House at Saffron-hill, and pull'd part of that House down and the next to as it, and struck at one that admonished him to be quiet, so that here are several Acts of force found to be actually committed by him in pursuance of their Design, and then there is no need to find him to be aiding and assisting, for that Clause we said was only necessary to be found where the Jury find a Person was there amongst them, and find no particular act of force done by him, but only his Presence, there it is necessary that they find he was present aiding and assisting; and for the same Reasons we held the Verdict to be full also against Lattimer, because it was first found that the Multitude was assembled as in the Indictment, on pretence of breaking Prisons and releasing Prisoners in general, which is agreed by all (except the Chief Baron) to be Treason, and then they find that Lattimer was amongst them, and Active in the breaking open the Prison at Clarkenwell, (where Prisoners, some for Felony and others were let loose) and that he was with the rest in the Prison after it was broken open, and

and so an Act fixed upon him: But altho' six of us were well satisfied in our Judgments as to them, yet when I waited on the King, I acquainted him that there was some difference in Opinion as to those two upon finding of the Special Verdict; and altho' the greater number of us were of Opinion, that the Verdict was well found as to those also, yet I intreated his Majesty to make use of that difference in Opinion to shew his Mercy towards them, the rather because we had agreed, that as to four of them the Verdict was clearly good as to proceed to Judgment against them, and that I hoped would be example enough to deter others from the like Practices; and besides it would appear an instance of his Majesty's great Mercy, that he would not proceed to the last extremity against any, where there was not a full concurrence of all his Judges which his Majesty was pleased to take very graciously, and ordered me to proceed accordingly, and so they two were spared: But as to Green in the first Special Verdict, and Bedell in the third Special Verdict, we all agreed that the Verdict was not full enough as to them for us to judge it Treason in them, because the Verdict only finds that they were present, and finds no particular Act of force committed by them, and both not find that they were aiding and assisting to the rest, and it is possible one may be present amongst such a Rabble only out of curiosity to see, and whether they were aiding and assisting is matter of fact, which ought to be expressly found by the Jury, and not be left to us upon any colourable Implication, and accordingly these two were discharged.

This Question was moved to me at the Old Bailey; A Man marieth two Wives, one in France and another in England, whether he might be indicted and tryed for that Felony here in England; and I took this difference, that if his first marriage was in France, and the second marriage, which maketh the Felony, was in England, then I was of Opinion, that he might be indicted.

A Man marieth two Wives, one at France and another in England, in what Case he may be tryed here.



dicted and tryed here for it, and the Jury might on Evidence find his first Marriage in France, being a meer transitory Act, and having nothing of Felony in it; and our Juries usually find such transitory acts, tho' they are done in a Foreign Nation; But if the first Marriage was in England, and the second in France, then I was of Opinion he could not be tryed for it here, because the Act which made the Felony, was done in another Kingdom, and Felonies done in another Kingdom, are not by the Common Law triable here in England. Quære.

Diversity.  
Vide Syderfin's  
Reports, fo.  
171.

Counterfeiting  
the Great Seal.

George Leake's  
Case concerning  
the abuse of the  
Great Seal,  
Hill. 4 Jacobi.  
Coke 12. Rep.  
p. 16.

By counterfeiting the Great Seal, what shall be Treason and what not, See Co. pl. Cor. fol. 15, 40. Afs. pl. 34. 42 E. 3. The Abbot of Brewer's Case, who caused his Com-moygn to raze the name of one Hannon in Letters Patents under the Great Seal, and to put in another Hannon instead of it, and 2 H. 4. Fol. 25. 37 H. 8. Br. Title Treason. But after all these Books was George Leake's Case a Clerk of the Chancery, who joined two clean Parchments fit for Letters Patents so close together with Mouth-glew, as they were taken for one, the uppermost being very thin, and did put one Label through both, then upon the uppermost he wrote a true Patent, and got the Great Seal put to the Label, so the Label and the Seal were annex'd to both the Parchments, the one written the other a blank; then he cut off the glewed Skirts round about, and took off the uppermost thin Parchment in which the true Patent was writ from the Labell which with the Great Seal did still hang to the blank Parchment, then he wrote another false Patent upon the blank Parchment and publish'd it as a good Patent: And the Question was, whether this Offence was High Treason or not: And it was resolved by all the Judges of England, that this Offence was not High Treason, but it was a very great Misdemeanor. Vide Hale Pl. C. 18.

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A Person hireth Lodgings in another Man's House, with Hangings, Bedding, and other Furniture in those Lodgings for a Month, and during that time, conveiteth away the Goods in the Lodging which he had hired with the Lodging, and the Party runneth away at the same time, and is after taken and indicted for this as for Felony, and whether this be Felony or not is the Question.

This is not found in the Origintil Manuscript, but may be fit to be Reported, because said to come from Mr. Serjeant Keyling, Son to the Chief Justice.

This Case is in this Book, and came before my Lord Bridgman, then Chief Justice of the Common Pleas, my self then Judge of the King's Bench, and my Brother Wyld, then Recorder of London, at a Sessions in the Old Baily, and then we all were of Opinion that this was no Felony, because the Party had a special Property in the Goods by his contract, and so there could be no Trespass, and that there could be no Felony where there was no Trespass, as was resolved in Holmes's Case, who set fire to his own House, which was quenched before it went any further, and accordingly the Prisoner was by us then discharged.

*Vide ante 24.*

But upon more serious Thoughts I take it to be a Case worthy of great Consideration, because I think the Case in the 13 E.4. fo. 9. which was by the King and his Council refer'd to all the Judges in the Chequer-Chamber, and by them resolved to be Felony, is a stronger Case than the Case now put.

There the Case was, one bargained with another to carry some Packs of Goods for him to Southampton, and delivereth the Goods to the Carrier, and he taketh them and carries them to another Place, and there opens the Packs, and takes the Goods, and disposes of them to his own use, and the Question was, whether

ther that was Felony or not ; and tho' it was objected that the Goods were bailed to the Carrier, and therefore there could be no Felony, that was agreed generally to be good Law. And it was also objected that an Indictment against one that he felonice asportavit such, Goods is not good, but it must be felonice cepit & asportavit, and in that Case the taking was lawful ; yet it was resolved that it was Felony, because his subsequent act of carrying the Goods to another Place, and there opening of them, and disposing of them to his own use, declareth that his Intent originally was not to take the Goods upon the Agreement, and Contract of the Party, but only with a design of stealing them. Now methinks the Case in Question is much stronger : For in that, the Party himself cometh to hire the Lodgings and Goods, and when he after taketh them away, this declareth that his Original Intent was only by the hiring of them to give himself the opportunity to steal them, and so his first hiring them is, In fraudem Legis, and of that he shall take no advantage, Co. Pl. Cor. 64. Some under pretence of a Robbery raise a Hue and Cry, and call a Constable to search a House in the Night time, and the Constable coming, the Owner of the House opens the Door, and then those Persons bind the Constable, and those in the House, and rob them, this is Burglary ; because they procured the Door to be opened to them in the Night by Fraud : So in this Case, the party hiring the House by fraud, only to have an Opportunity to steal the Goods, shall not take Benefit of that Fraud. And Mr. Lec told me, That it hath been resolved, that, If one come into *Smithfield* on pretence to buy a Horse, and Cheapen one, and the Owner giveth him leave to take the Horse and ride him to try his Paces, and then he taketh the Horse and rideth quite away with him, this is Felony. And so if one deliver Goods to a Porter in London to carry to a certain place, and he taketh them and carrieth them away to another Place, and there openeth and disposeth of them, this is Felony ; which last Case seemeth to be warranted by the Case before cited out of 13 E. 4. Note, That the breaking open the Packs and



and disposing of the Goods is necessary to shew the intent of Stealing.

But I marvel at the Case put, 13 E.4.9. b. That if a Carrier have a Tun of Wine delivered to him to carry to such a Place, and he never carry it but sell it, all this is no Felony; but if he draw part of it out above the Value of Twelwe pence, this is Felony; I do not see why the disposing of the whole should not be Felony also.

But the Case there put is, A Carrier does carry the Goods to the place appointed, and after takes them away and disposeth of them, that is Felony, because the Bargain for his bringing them was determined when he brought them to that place appointed, and the Possession then is in the first Owner.

A man having a Dwelling-house lets a Cellar, to which the Passage is out of a Street and a Chamber, to J. S. and he lieth in the Chamber, and the Cellar is broken open in the Night. If this be Burglary? I thought not, and took a difference betwixt an Inmate and a divided house, which is, where there are several Doors, and one Dwelling actually divided and separated from the other, there it is Burglary, and shall be laid for breaking the dwelling house of him who hired the divided part. But as to an Inmate who goeth in at the same Door, he is in the Nature of a Lodger, and if his Chamber be broken open, I thought it Burglary. But you must lay the Indictment for breaking the Dwelling-house of him that let it, and not of the Inmate, because I thought it was but one Dwelling-house, in case there be Twenty Inmates: And tho' there be a private Contract between the Parties, that hath not severed the Dwelling-house, so as to make them several Dwelling-houses. For then, what need that difference of Inmates and divided houses? for if  
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in Inmate hath a divided Dwelling-House, he differs nothing from the other. But Mr. Lee desired that it might be advised of, because he saith their use hath been otherwise, and he said that else, if the Rooms of the Inmate where he lieth were broken open in the Night time, there would be no Burglary, because he said the Contract had severed them from the Dwelling-house of him who let them. But in that I differed; For I think that where there is but one out Door, at which the Owner and Inmate enter, this remaineth to be all the Dwelling-house of the Owner; and tho' the Inmate hath an Interest against the Owner that will not serve to make it the Dwelling-house of the Inmate. But the Indictment must be for Burglary, in breaking the Dwelling-house of the Owner, and stealing the Goods of the Inmate. (Quære.) But for the first Question, Where a Cellar which hath its going into it only out of the Street is let to a stranger; If this Cellar be broken open, I conceive it no Burglary, for it is separated by the Contract, and actually severed from the House by excluding all Communication with the House, no passing being betwixt the House and the Cellar. So it hath been resolved, if a man let a Shop only, and sever it from his House for Years, &c. and the Party who hath the Shop doth not lodge in it, and this he broke open in the Night, this is no Burglary. And how to make such a Cellar and a Chamber in the Dwelling-house, which are let to an Inmate to be the Inmate's Dwelling-house, I do not well understand: Then Mr. Lee said it might be of ill Consequence; for now since the late Fire, every House hath many Inmates, where the Inmates lodge. And suppose he who hath the Dwelling-house (and lets the several Rooms to those Inmates) should in the Night break open their Rooms and steal their Goods, it would be hard if it should not be Burglary. To that I say it is Felony in the Owner of the House, if he steal their Goods; but to make it Burglary to break his own House, in case the Law be as I suppose, that cannot be. And I suppose letting of Lodgings to several Persons, doth not make several Houses if they all go in at the Door of him who lets the Lodgings, and so are but Inmates.

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But otherwise it is, if a man sever some Rooms from his House, and make another Door to those Rooms, and so divide the House, that divided Part is the Mansion-house of him who hires it, and it is Burglary if it be broken open; And shall be laid so, for breaking the Dwelling-house of him who hires that part.

Term. Mich.

12 Car. II. in B. R.

St Charles Stanleys

CASE

Z Term.



## Term. Mich.

15 Car. II. in B. R.

Sir Charles Stanley's

## C A S E.

This is in another Manuscript of the L. Chief Justice *Kelyng*.

**S**IR Charles Stanley and one Andrews, were tryed upon an Indictment of Murder. The Case was, Sir Charles Stanley was arrested by a Bailiff, and endeavoured a Rescue, and shot off a Pistol at the Bailiff, and then the Bailiff closed with him and cast him down, and after some of his Servants and others who came in Aid of him, killed a Servant of the Bailiff's who came in Aid of the Bailiff: And it was Resolved by all the Court, Hide Chief

Chief Justice, Twisden, Windham, and Kelyng, that if the Party who is arrested doth any Act of Violence to endeavour a Rescue, and then after one of his Party killeth the Bailiff, or any that cometh in his Aid, this is Murder in the party Arrested: For when several Men join in an unlawful Act they are all guilty of whatever happens upon it; as in the Lord Dacres's Case which is mentioned, 34 H. 8.

Brooke Sect. 237. The Lord Dacres and Mansell, and others in his Company came unlawfully to Hunt in a Forrest, and being resisted, one of the Company when the Lord Dacres was a great way off, and not present, killed a man: Judged Murder in him and all the rest, and the Lord Dacres was hanged. But it was agreed, that if the Party who is arrested yields himself, and makes no Resistance, but others endeavour to rescue him, and he doth no act to declare his joining with them, if those who come to rescue him kill any of the Bailiffs, this is Murder in them, but not in the Party arrested. But in this Case Sir Charles Stanley by shooting his Pistol, had joined in resisting the Authority of Law, and therefore a man being slain in this Act, it is Murder in him. And as for Andrews, there was no evidence, but out of his own Mouth; some discourse as if he had shot over Sir Charles Stanley in Aid of him when he was down, but the evidence to that was slight. But it was agreed by us all, That if a man be arrested, and he and his Company endeavour a Rescue, and while they are fighting, one who knows nothing of the Arrest coming by the way, goeth in Aid of the Person who is arrested, and draws his Sword, &c. here if any of the Bailiffs be killed, that Person who joined in Aid against them, tho' he did not know of the Arrest, yet is guilty of Murder. For a man must take heed how he joineth in any unlawful Act as fighting is, for if he doth, he is guilty of all that follows. And it being Murder to kill those who come to execute the Law; every one who joins in that Act is guilty of Murder, and his Ignorance will not excuse him, where the Fact is made Murder by the Law without any Justice precedent, as in the Case of  
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killing a Bailiff. But if two men go upon Malice pre-  
penssed to fight a Duel, and while they are fight-  
ing, a man who is acquainted with one of them join-  
eth and taketh his part and killeth the other, this  
is Murder in the Party who came with Malice pre-  
penssed to fight; but it is but Manslaughter in him  
who came to his Aid, because in him there was no  
Malice, but as to him it was a sudden thing. And  
here the Law doth not imply Malice, as it doth  
in every one who resisteth the Execution of Ju-  
stice.

Term.



# Term. Mich.

8 Will. 3.

## *Lisle's Case, in Banco Regis.*

**A**T the Assizes and Gaol-delivery held for the County of Cumberland, at Carlisle, 15 Aug. last, before Sir Edward Ward Lord Chief-Baron, and Justice Turton, Thomas Lisle Gent<sup>r</sup> was indicted for the Murder of Richard Armstrong, upon which he was arraigned and tried, and convicted of Manslaughter only. Immediately after, John Armstrong, Brother of Richard, put into the Court a Bill of Appeal for Murder, and did then pray by his Council, That the Appeal should be received and filed, and that Lisle should be immediately arraigned thereupon. Whereupon, and before the Appeal was arraigned, Lisle did demand the Benefit of his Clergy; And then the Bill of Appeal by the Council of Armstrong was read in open Court, and Lisle did appear thereunto, and prayed to be bailed, but refused to plead; upon which he was remanded to the Gaol quousque, &c. All which Proceeding was entered upon the Record of the Indictment of Murder with the Conviction of Manslaughter, and was returned upon a Certiorari into this Court, and thereupon the Appeal of Murder was also returned; but upon the Record of that, no mention was made of any Proceeding. Lisle was also brought to the Bar upon an Habeas Corpus directed to the Sheriff of Cumberland, and was committed to the Marshalsea, (tho' he prayed

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to be bailed;) but the Court did not think fit to bail him for the present; for it being the latter-end of the Term, did adjourn the consideration of it to the next Term; at which time Lisle being brought to the Bar by Rule, the Court was of opinion that he might be bailed. The Question was, Whether one convicted of Manslaughter might be bailed before he had his Clergy? The Case of Dyer 297 & 42. is, That he cannot be bailed; which may be admitted to be Law, for tho' Justices of Oyer and Terminer and Gaol-delivery might not bail in such a Case, yet the King's Bench is not restrained from bailing by the Statute of 1 W. c. 15. 2 Inst. 185. but hath a liberty of bailing by the Common-Law, if the person be not attainted. And so was it done in this Court, 10 Jac. Coke's Entries 355. upon the like Conviction of Manslaughter, upon a Trial at the Bar: The Court, without calling the party to Judgment, took time to advise until the next Term, and bailed the Prisoner then to appear. Afterwards at another day, it was questioned, Whether the Court should call Lisle to know what he could say why Judgment should not be given against him, and if he should demand the Benefit of his Clergy, allow it to him? And after Argument at the Bar it was resolved, That forasmuch as there was a Record of Conviction returned to the Kings Bench, the Court ought to proceed to Judgment thereupon, tho' there was an Appeal returned to be commenced.

#### For these Reasons:

1. Tho' the Appeal was not totally discontinued, but had an existence, yet it was without day; for being commenced at the Gaol-delivery, it had no continuance upon it, nor indeed could it have any, for no continuance can be taken from one Session of Gaol-delivery to another, but from one day to another it may be, if that Session be adjourned, which doth not appear in this Case; but all Proceedings upon Indictments

Indiments and Appeals commenced at one Gaol-delivery, unless Convictions thereupon, are determined by that Session, so that this Appellant and Appellee have no day in any Court; And the Appeal being removed into the King's Bench, the parties having no day in Court, the only means to retrieve it, is, for the Appellant to come into Court, and pray that the Appellee being in custodia Marr' may be arraigned; and if he was not in the Marshal's custody, take Process against him, 9 H. 4. 2. St. p. C. 651. which may be done at any time. But if the Appellee be desirous to be discharged of the Appeal, then he ought to sue a Scire facias against the Appellant, and if he doth not appear Nonsumt him, St. p. C. 70. a. b. From hence it is to be concluded, That since the Appeal is without day, and cannot be proceeded upon unless revived in the manner before mentioned, there is no reason for the Court to take any notice of it, but to proceed upon the Conviction had upon the Indiment, as if no Appeal had been commenced.

2. The Court, as the matter stands upon this Record, ought to proceed upon the Conviction; for it appears that not only the Indiment was preferred, but even the Trial and Conviction of Manslaughter was before the Appeal commenced; and therefore by the express words of 3 H. 7. That in case of Murder, the Murderers shall at any time be arraigned and determined at the King's Suit, within the year, without tarrying for an Appeal. Now the Indiment being proceeded upon, and the party tried before the Appeal commenced, the Court of Gaol-delivery ought to determine it; for tho' the Appeal interposes after Conviction, and before the Conviction upon the Indiment is called to Judgment, yet the Judgment upon it hath relation to the Conviction, and on the giving of it no notice is to be taken of the Appeal, nor is any Entry to be on Record, to hinder the Court from giving Judgment. And if the Trial was lawful, the Judgment thereupon must be as lawful; for otherwise it would be in the power of a person by putting in an Appeal to render the Verdict ineffectual, which is contrary to the words and intent of



of the Statute; for suppose the Conviction had been for Murder, the Indictment being well commenced and proceeded upon, the subsequent Appeal cannot obstruct Judgment, but the Court ought to condemn the Prisoner, otherwise the Statute of 3 H. 7. is not observed, which requires not only a Proceeding on the Indictment, but a Determination: And the Statute would be as little observed if Judgment should be respited upon the Conviction of Manslaughter as upon a Conviction of Murder.

3. By the Common-Law no Conviction or Acquittal could be avoided by an Appeal interposing before Judgment: but tho' Judgment was respited, the Defendant in the Appeal might plead the Acquittal or Conviction had in Bar to the Appeal, St. p. C. 106. 16 E. 4. 11. 45 E. 3. 25. 4 Rep. 45. Wrote and Wiggess; against which there are but two Cases, viz. 17 Ass. p. 1. which are contradicted by the Opinion and Observation of B. tit. Appeal 55. that declares the Common-Law to be contrary until 3 H. 7. The other is Dyer 296. p. 20. which is so very strange, that it cannot amount to the least Authority. That Case was, viz. One indicted of Murder was convicted at the Gaol-delivery of Newgate, and before Judgment given the Wife brought an Appeal; to which the Defendant pleaded, that she had taken another Husband in a Foreign Country. The matter resting about a year, the Indictment was removed in B. R. and the party convicted called to Judgment upon the Indictment, and he pleaded the Appeal depending; to which Nul tiel Record was pleaded; but afterwards the Plaintiff in the Appeal was Non-suited, and then Judgment of Death was given against the Defendant. Observe, That Case is left with a Quare, and so no Judicial Determination as to this Point, saving that the Man was hanged.

1. The Court gave no Opinion concerning the sufficiency of the Plea.

2. It doth not appear how the Plaintiff became Non-suited.

For there was not any opportunity for it, therefore it was irregular; for the Plea was discontinued by the Certiorari; for all Removals of Causes upon Certiorari's determine the Plea; therefore that Case is no Authority, but only an History of what was done; for the man was well condemned and executed upon the Conviction, and those scruples then made were very unnecessary.

For which Reasons the Court did arraign Lisle upon the Conviction of Manslaughter, and he demanded his Clergy; which being allowed to him, he read as a Clerk, and was burnt in the hand.

Armstrong *versus* Lisle.

Mich. 8 W. 3. Rot. 565.

**I**N the Appeal of Murder before mentioned, the Defendant sued out a Scire facias against the Plaintiff to prosecute his Appeal, returnable Quinden' Pasch'; at which day the Plaintiff appeared, and by his Council at Bar did arraign the Appeal. It being prayed that the Defendant might answer thereunto, the Defendant pleaded the Indictment, and Conviction of Manslaughter at the Assizes, which was removed into the King's Bench; and that no Judgment was thereupon given; and that at the time of the Conviction he was, and yet is a Clerk; and then pray'd his Clergy, and offered to read as a Clerk if the Court would have admitted him thereunto; and that afterwards, on Monday post Crastin' Pur' Beate Mariæ Virginis last, being demanded by the Court why Judgment should not be given against him, he demanded the Benefit of Clergy; which being allowed to him, he read as a Clerk, and was burnt in the hand per Recordum, &c. with the usual Aberments. And as to the Felony and Murder pleaded Not Guilty. *Co*  
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To which Plea the Plaintiff made a frivolous Repliation, and the Defendant thereunto demurred.

The Question was, Whether this Plea was a good Bar to the Appeal? And it was resolved by the whole Court, That the Defendant being convicted of Manslaughter, and allowed the Benefit of Clergy, and creating as a Clerk did bar the Appellant of his Appeal of Murder. And tho' the Reasons given in the former Case may be sufficient to justify this Resolution; yet many things may be fit to be added for further Explication of this matter, which hath for a long time been in much obscurity, and laboured under very great variety of Opinion.

1. The Conviction or Acquittal upon an Indictment of Murder or Manslaughter was at Common-Law, a good Plea in Bar to the Appeal. For the Proceeding upon the Indictment may be legal, tho' the Appeal was then pending; And if the party convicted should have had Judgment of Death given against him if he was no Clerk, there is the same reason he should have the Benefit of the Conviction and Clergy if he were a Clerk. The like if he be acquitted; for if convicted he should suffer Death, therefore if acquitted he should be discharged.

To the Authorities before cited, these may be added, F. N. B. 115. h. where an Appeal of Murder was depending, if within the year and the day, the Justices of Gaol delivery did proceed to try the Appellee upon an Indictment of Murder, and he was acquitted, he might have a Writ of Conspiracy, tho' he was not tried upon the Appeal; which could not have been maintained unless the Acquittal upon the Indictment had been a perfect and absolute Discharge of the Offence, 21 H. 6. 28. Fitz. tit. Conspiracy 6. 7 H. 4. 35. Hale 244. That an Acquittal upon an Indictment is a good Bar to an Appeal of Murder. The reason whereof is more strong in the Case of an Appeal of Death than in any other Appeal, to wit, of Robbery or Larceny, (in which an Acquittal upon an Indictment would be,  
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and is to this day, a good Bar) St. Pl. Cor. 106. For the Appellant seeks only Revenge for the Death of his Ancestors, without regard to the Publick: But in an Appeal of Robbery or Larceny, he is to have Restitution: but if a person be murdered, the King prosecutes to have an Example of Justice made for the Safety of all his People; besides, the King is more concerned in Interest, being to have the Forfeiture of all the Goods and Chattels of the Offender, and the Pear, Day, and Waste of his Lands.

And tho' the Prosecution at the King's Suit was frequently delayed for the Benefit of the parties Appeal, yet that was not ex pvisione Legis, but meerly by the discretion of the Judges, for the more effectual Prosecution of the Offender, by encouraging the persons who were most concerned, and therefore were thought to be most zealous therein. This appears by St. Pl. Cor. 107. Fitz. tit. Coron. 44. 22 E. 4. when the Justices did agree, That that course of delaying to proceed on the Indictment within the Year should be observed, for the sake of the parties Appeal, which was frequently practised before, but not so firmly established until then. Hale Pl. Cor. con. to 40 Ass. p. 40. But the Mischief thereof being in some few years perceived, occasioned the making the Statute of 3 H. 7. which abolished that Liberty which the Judges took, and obliged them to proceed upon the Indictment at any time within the Year, and upon no account to tarry for the Appeal; and to encourage that Proceeding, saves the Benefit of the Appeal, notwithstanding the Attainder or Acquittal, except when Clergy was had; for that Exception is to the Purview of the Statute, and shews what the Law was before, viz. That when Clergy was had upon a Conviction or Attainder of Murder upon the Indictment, it was a good Bar of the Appeal before the Statute.

It is most true, That if an Appeal was freshly brought, and pending before the same Justices before whom the Appellee was indicted, the Court ought to proceed rather upon the Appeal than the Indictment, because

because of the Interest of the Appellant, who in case of Robbery ought to have Restitution, which upon an Indictment before 21 H. 8. he could not have; and in an Appeal of Death the Wife or Heir might have Execution upon the Judgment (notwithstanding any Pardon) in Revenge of the Injury done to her or him: And the preferring the Appeal then pending, to the Indictment, was no hurt to the Publick Justice of the Kingdom; for if the Appellant was Non-suited, or did release either before or after Attainder, the Prosecution was devolved to the King, who might cause Proceeding to be upon the Appeal, and Execution to be had upon the Judgment. But at the Common-Law, if there was a default of Fresh Suit, the Appeal was lost, if the Defendant did plead it in Abatement. Vide Stat. Glouc. cap. 9. Brañ lib. 3. 139. 2 Inst. 319. Qui appellare voluerit, debet ille cui injuratus fuerit, tam cito quam poterit, Hiresium levare, &c. Therefore, by such a neglect of Fresh Suit, the Prosecution belonged to the King to proceed by way of Indictment. But in that case the Appellee, upon an Appeal commenced against him, could not take advantage of the want of Fresh Suit, unless he had pleaded it. And in an Appeal of Robbery or Larceny, tho' the Defendant did not plead in Abatement for want of Fresh Suit, but was thereupon convicted, yet the Appellant could not have Restitution unless the Jury did find the Fresh Suit.

But great Question hath been made, of what should be accounted a Fresh Suit? Vide St. Pl. Cor. 165, 166. where, upon consideration of all the Books, it is settled, That it is not capable of any certain Definition, but must be determined by the Discretion of the Justices. Now if the Party robbed, be not as ready to prosecute his Appeal, before the Justices of Gaol Delivery, as the King's Officers are to prosecute an Indictment, and the Offender be in Gaol; or if the Party shall chuse rather to Prosecute upon the Indictment; this is a neglect of the Appeal, and a default of Fresh Suit, so far as to vest the Prosecution in the King; for though it is very reasonable to prefer the Appeal

Appeal to the Indictment, yet there can be no reason to defer the King's Prosecution by any affected delay in the Party that should bring his Appeal. Therefore, if at any time the Court did proceed upon an Indictment, when an Appeal was depending; It must be presumed, that the Person injured was Negligent or Remiss in the Prosecution of the Appeal, or that the Appeal was conveniently brought to obstruct the King's Prosecution, which is the same in Judgment of Law, as if none was brought at all, or that the Party did choose to proceed upon the Indictment rather than the Appeal. And therefore at the Common Law in case of Death, and then, and now, in that of all other Felony, If one were tried and acquitted upon an Indictment, if the Person injured did bring his Appeal, and the Defendant did plead his acquittal, the Appellant could not reply that he brought his Appeal by fresh Suit; for that would be to Arraign the Justice of the Court in a matter that is left to be tried by Examination; and to be determined by the Justices, for the Appellant might bring his Appeal conveniently, or if really, choose rather to proceed upon the Indictment.

Obj. But there is an objection that seems plausible, which is, that before the Statute of 3 Hen. 7. the Court was obliged by Law, not to proceed upon the Indictment of Murder within the Year and a Day; for though at Common Law, the Appellant was to make fresh Suit; yet the Statute of Glouc. chap. 9. hath given a Year and a Day to the Appellant to bring his Appeal, which is instead of fresh Suit: And therefore where there was fresh Suit, the Court ought rather to proceed upon the Appeal, than upon the Indictment. And since the Party hath a Year and a Day to bring his Appeal, there can be no default imputed to him until that time be expired.

Resp. To this I answer. First, That the King, as to his Prosecution is not obliged by any words in the Statute, but only the Defendant, if the Appeal be brought within the Year, is disabled to plead in



Statement thereof the want of fresh Suit. For the Statute was made for the advancement of Justice; but if there should be such a consequence deduced from it, that the Defendant could not be tried upon the Indictment within the Year, it would tend much to the delay of Justice.

Resp. 2. Secondly it appears, not only by all the Books before mentioned, that the not proceeding upon the Indictment was only an Agreement among the Judges themselves; but the recital of the Statute of 3 H. 7. doth not mention that, that delay was by Law; but only that it was used to tarry.

Resp. 3. Thirdly, That Agreement of the Judges plainly shews, that if the Defendant had been tried and acquitted or convicted, that would have been a good bar to the Appeal, otherwise that delay was to no purpose.

Resp. 4. Fourthly, The Defendant in the Appeal could not hinder his being tried upon the Indictment, for he could not plead the Appeal depending, either in bar, or in delay of the Trial, 43 E. 3. 25. a. 31 H. 6. 11. Now, if he was tried and acquitted upon the Indictment, and yet should be liable to the Party's Appeal, his Life must be twice in jeopardy; so that though the Judges did do an injury to the Appellant in trying the Prisoner upon the Indictment, either within the Year, or pending the Appeal, (which is not to be supposed) yet that ought not to affect the Appellee, who could not prevent his being tried.

It is in the next place to be considered, whether the Court can delay the allowing of Clergy, to a Prisoner convicted of a Crime within the benefit of it. And if the Court should respite the allowance of Clergy, what the consequence would be.

The Court ought not to delay the Party having the benefit of his Clergy; for it his right, if he be capable of it, Hob. 289. Searle against Williams.

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First, It may not be improper to enquire how his right of having Clergy did commence. Secondly, How Laymen came to be intitled to it. This right began by an encroachment of the Pope upon the Temporal Power, in the behalf of the Clergy; whom the Pope by his Ecclesiastical Constitutions did as much as in him lay, exempt from the Jurisdiction of Lay Judges. Therefore, though the whole Body of the Clergy stood upon it, as appears by St. Ar. Cler' C. 15. that Clericus coram Seculari Iudice judicari non debet in case of Life or Member; yet the Temporal Courts did not wholly yield to this Imposition, but only in part, and qualified it in a great measure.

1. They would indict Clerks for Felonies, and Crimes as well as others, and proceed thereon, until the Ordinary did demand them. And if the Ordinary would not demand them, anciently the King's Courts took no notice of them; but would proceed to Conviction, Attainder and Execution. And if the Ordinary did claim Clerks before Conviction, then an Inquisition was taken, whether the Party was Guilty or not, ut sciatur qualis Ordinario deliberatur, and if acquitted, discharged; but if found Guilty, then delivered to the Ordinary, who was to proceed to Purgation. This privilege so restrained and ordered, was confirmed and established by the Statute of W. 1. cap. 2. and thereby became an undoubted right to all Clerks; which was confirmed and allowed by divers Acts of Parliament since. But then the Ordinary was to proceed to deprive the Clerk of his Character, if he could not purge, whereby he became a meer Layman: For though at first the Clergy never intended that any should have that privilege, but those who were in Holy Orders; yet afterwards they extended it to those who were not strictly in Orders, but were assistants to them in doing Divine Offices. See Linwood 92. That they should have the privilege of Clergy, who had but primam tonsuram, which for the purpose was the Clerk that sung or set the Psalm, who was comprehended under the word Clericus, Lin-

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wood 17. So was the Door-keeper of the Church or Chapel, the Reader, Exorcist, Sub-Deacon, which because the Temporal Courts did not readily allow, occasioned the complaint of the Clergy, as appears by the Statute in 25 E. 3. cap. 4. That Clerks Seculars, &c. had been Drawn and Hanged, by the award of secular Judges; in prejudice of the Franchises, and in opposition to the jurisdiction of Holy Church. Therefore it was granted by the King, that all manner of Clerks, as well secular as Religious, which should be convicted before secular Justices, should have that privilege; which word Clerk in that Statute hath reference to the Canon Law, and being made to establish a privilege claimed thereby was expounded by it, which included all that were of those inferior Orders. And from thence it is to be observed, occasion was taken in after-times to alter the method of allowing Clergy; for at the Common Law, if the Party had not demanded his Clergy before Conviction, he lost it, St. P. C. 151. Prisoner Chief Justice of the Common Pleas in the time of H. 6. made an alteration, and would direct the Party indicted or appealed to answer to the Felony, and after Conviction upon his demand allow him his Clergy, which course has been ever since observed, being grounded upon the said Statute of 25 E. 3. cap. 4. that allows it to Clerks after Conviction.

Now the next enquiry will be how meer Laymen, who had no relation to any Ecclesiastical Employment came to enjoy this Privilege. It is to be known that in those days few were bred to Literature, but those who were actually in Orders, or educated for that purpose. And therefore the way of trial whether one was a Clerk or no was by Reading, of which the Court was Judge, and not the Ordinary; for if he could not Read the Court would not deliver him as a Clerk, tho' the Ordinary did claim him. And if he did Read, he should be allowed as a Clerk, tho' the Ordinary refused him. See St. Pl. C. 131, 132. where the Books are quoted, the variety of Opinions considered, and the Law settled. And reading being the way of  
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of trial, whether a Man were a Clerk or not, without further examination into any other qualification, all Persons that so approached themselves by reading were allowed to be Clerks, which is an equitable construction of those Statutes, that established and extended that Privilege, because they were tried and found by their reading to be Clerks.

And further, the allowing Clergy to Lay-men that could Read, seemed very much in favour of the Clergy, in preserving its Succession, by exempting such who were capable of receiving any Orders, when there was occasion for their Service: For though Men were never so well qualified for being Clergymen; yet by the Canon Law, which is still in force they were not to receive any Orders, until a place was provided for them; which favourable construction of the Statutes in not confining the benefit of Clergy to those who were actually in Orders, but who were capable of them, received constant approbation and allowance. See 4 Hen. 7. cap. 13. that enacts, that every Person not being within Holy Orders, that once had the benefit of his Clergy, should not be admitted to it at any other time. And the like Act was made 4 Hen. 8. which for Murders, Robberies, &c. excludes all Persons from the benefit of Clergy (Clerks in Holy Orders excepted;) which gave much offence to the Clergy, because the construction of the words Holy Orders, was confined to the greatest Orders, as Deacon and Presbyter, excluding not only Lay-men, but all the inferior Orders, whose Orders are not accounted sacred. See Linwood 92. for they had only primam Tonsuram, which caused the Abbot of Winchcomb in his Sermon at Paul's Cross to inveigh against that Act; and to avoid the force of it against those of the inferior Orders, the Clergy insisted, that tam minores quam majores Ordines fuerunt sacri. See Keil 180. the whole debate of that matter.

That Lay-men, that could Read, ever had the Privilege of Clergy since 25 E. 3. doth appear with-

out contradiction by our Books, which allowance never was condemned in Parliament, or complained of as a grievance; but rather approved of. And the Statute of 18 Eliz. being made, extends to all Persons, that at that time were admitted to the benefit of Clergy, and used to be delivered to the Ordinary; whereby every Person, as well Lay, as Spiritual, hath a right to the benefit of that Statute for the first Offence, in the same degree as Clergy-men in the greatest Orders had before. The Statute enacts that,

1. One that shall be admitted to the benefit of his Clergy (which is, every one that demands it and Reads) shall not be delivered to the Ordinary: But after reading, and burning in the Hand shall be delivered; which amounts to, and hath the same effect as a Purgation before. Vide 5 Rep. 115. Foxley's Case.

2. If the Offence be heynous, the Court in discretion may inflict any other Punishment, not exceeding a year's Imprisonment; whereby there is no room left for the Court to exclude him from the benefit of his Clergy, upon which his Discharge depends. And if it be so heynous, the Court ought to proceed regularly and give him that additional Punishment, that the Law doth direct after Clergy had. So that the Court is bound up to that manner of proceeding, which the Statute hath prescribed; but to remand him to Gaol without doing either, is without any Warrant, Rule or Method in Law, and contrary not only to 18 El. and 3 Hen. 7. but to the 25 Ed. 3. In the recital whereof, complaint was made that Clerks being attainted were remanded to Gaol upon a Suggestion that other matters were against them; yet the Law was, that those Clerks should not be remanded to Gaol, but presently arraigned of all against them, otherwise immediately delivered to the Ordinary; so that he ought not to be kept longer than the same Session or Gaol-delivery, though he was indicted for other Crimes. Vide St. Pl. C. 152.

It is not enough to say, That where there is an absolute Acquittal, he should be liable to the Appeal, therefore much more where he is convicted of Manslaughter, and acquitted of the Murder: for first, the Statute 3 H. 7. makes him liable in the one Case, and exempts him in the other.

2. In many cases a Conviction and having Clergy conduces more to the Safety of the Prisoner than an Acquittal; for if the Prisoner were convicted and had his Clergy, he was thereby discharged of all Crimes committed before Clergy had, until 8 Eliz. But if he had been acquitted, he was liable to answer for any others committed before his acquittal, Dyer 214. 1 And. 114. And tho' the Clergy be taken away from Murder, with which he is charged in the Appeal, yet that makes no alteration; for Manslaughter is the same Offence, only differing in Circumstance and Degree; and at the time of the making the Statute of 3 H. 7. Clergy might be had for the One as well as the Other; and the subsequent Statutes of 23 H. 8. and 1 Ed. 6. have not that effect as to hinder him from having his Clergy for any Offence for which he was not excluded from it. For it would be very strange that the 23 H. 8. c. 1. and 1 Ed. 6. c. 12. should have those consequences, first, by taking away Clergy for Murder, to hinder one from the enjoyment of it that is only found Guilty of Manslaughter, tho' appealed of Murder; and secondly, to put a Man upon another Trial for his Life, when he was before in danger of it, which is contrary to a Maxim of the Common-Law, 4 Rep. 45. Vaux's Case.

3. To suspend the Allowance of Clergy, is to take away a Man's Defence, whereby he might prevent the being convicted of Murder, which Conviction deprives him of his Clergy; for, notwithstanding these Statutes of 23 H. 8. and 1 Ed. 6. if a Man had been convicted of another Manslaughter or Larceny, and had his Clergy, he might have pleaded that Conviction and Allowance of Clergy in Bar of an Appeal or Indictment of

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Murder committed before Clergy had, tho' ousted of Clergy if convicted, Dyer 214. and 3 H. 10. The recital of the Statute shews that the Law was so, till altered by that Statute, which by no construction can extend to this Case, because it is the same Offence.

The Statute of 3 H. 7. is severe in overthrowing a Fundamental Point in Law, in subjecting a Man that is acquitted, to another Trial, which is putting his Life twice in danger for the same Crime: Therefore the Purview of 3 H. 7. ought to be taken strictly, and the Exception favourably,

1. Because that Exception preserves the ancient Right that a Man had, and the Benefit of Clergy hath been always extended upon the construction of any Act of Parliament made for the Preservation of it: Therefore the construction 23 E. 3. is, That as soon as ever a Man is recorded to have read, he is immediately the Ordinary's Prisoner, tho' remanded to the Gaol, and the Temporal Court hath nothing more to do with him. *St. Pl. Cor.* 102.

2. It is such a Privilege, of which no general words in an Act of Parliament have been construed to deprive an Offender: Therefore, if a Fact be made Felony by a Statute wherein are these express words, viz. That the Offender shall suffer Pains of Death, as in the Statute of 1 Jac. for Polygamy, &c. yet the Offender shall have his Clergy. Vide 3 Inst. 73. and many other Instances.

3. Tho' the Appeal be attached in the Appellant, yet the Conviction of Manslaughter upon an Indictment, pleading the Appeal, and Clergy allowed, will be a good Bar thereunto. Vide 4 Rep. 47. Wrote and Wigg, which hath these words, viz. If before Plea pleaded he hath his Clergy, &c. which must have this construction, viz. If the Appeal be in the same readiness to be tried as the Indictment, then it ought to be preferred to it; but if not, the Indictment may be proceeded upon, and the Conviction of Manslaughter with Clergy will be a good Bar to the Appeal.

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4. It is fit to consider what the consequence would be to the Defendant in an Appeal of Murder, if he had been convicted of Manslaughter, and the Court should not call him to Judgment, whereby he could not have the opportunity of demanding the Benefit of his Clergy, which he is not to have without demanding it, Hob. 289. Scarl and Williams; or at least, if he had demanded the Benefit of his Clergy, and no Record made of it: First, it would be an apparent injury done to the Publick Justice of the Kingdom, in not proceeding to Judgment upon a Conviction, unless there be some reason in point of Law appearing upon that Record of Conviction that may justify the Court to advise and consider. 2dly, It would be a great absurdity to try a Man in order to hang him, and yet if the Verdict be such that he may be saved, he shall be deprived of the Advantage thereof, which is to subject the Life of a Man to the arbitrary disposition of the Court, tho' there be a Law by which he might be saved. But this delay of the Court shall never turn to the Damage of the Prisoner; for if he be a person capable of having his Clergy, he may plead the Conviction of Manslaughter upon the Indictment, and that he was a Clerk, and was ready to have prayed his Clergy in Bar of the Judgment, and that the Court, without giving him an opportunity to demand his Clergy, did remand him to Gaol; for the delay or doubt of the Court, notwithstanding there might be cause of doubt concerning it, shall not prejudice the party, 4 Rep. 45, 46. Burgh and Holcroft's Case is full in point: There the party was called to Judgment, and did pray his Clergy, but the allowance thereof was respited by the Court upon a *Curia advisare vult*; yet it was as effectual to him, and allowed to be as good a Plea in Bar to an Appeal of Murder as if it had been allowed to him, because the respiting of it was the Act of the Court. It would be wonderful strange, that the delay of the Court in one Case shall not be a Damage to the party, and in the other it should. The not calling him to Judgment is as much the delay of the Court in one Case, as the respiting the Clergy in the other; both are as much without the Letter, and within the same Equity of the Saving in the Statute.

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These Matters seem to make this point very clear; and being so obvious, it is a great wonder that ever any question should be made of it; yet it is most certain that Tothill, Yardly, & al', were in 18 Car. 2. tried in Kent before the Lord Chief Justice Bridgman for a Murder, and convicted of Manslaughter, and he refused them the Benefit of Clergy; upon which an Appeal was brought in the King's Bench, and the parties pleaded Not Guilty, and were tried again, Kelyng then Chief Justice, Twisden, Wyndham, and Morton, Justices. Whether they were acquainted, with the deferring to proceed to Judgment at the Assizes, and did approve of it, doth not appear.

Since then there have been divers other Cases, which in the last Reign were resolved by all the Judges of England, That the Court might delay the calling the Convict to Judgment, to hinder him from praying his Clergy; especially if any Appeal were depending before it was allowed, in order to make the Defendant liable to the Appeal. One was the Case of Goring and Deering, where the Defendant pleaded his Conviction of Manslaughter upon an Indictment, That he was a Clerk, and ready and desirous to have his Clergy, if the Court would have called him to his Judgment. That Plea was over-ruled, and upon his Plea over, Not Guilty, he was tried before me, Pasch. 1 W. & M. at Nisi Prius in Middlesex, and again convicted of Manslaughter, and the burning of his hand was pardoned. I did not hear the Reasons of that Judgment, but I suppose that Precedent of Tothill and Yardley, which was made by so great a Man as my Lord Bridgman, who possibly might do it only to have the Point solemnly settled and determined, and some other subsequent instances in pursuance thereof, did prevail: But notwithstanding what had been so practised, and afterwards so solemnly resolved, we did, upon the Reasons before mentioned, resolve, That the Defendant Lisle's Plea to the Appeal was a good Bar, and gave Judgment for the Defendant.

From



From the Matter of this Debate may be drawn these four Conclusions :

1. If one be indicted of Murder, and thereupon convicted of Manslaughter, and the Court will not call him to Judgment, but continue him over to another Gaol-delivery, upon a Curia advisare vult de Judicio, &c. if an Appeal of Murder be brought, he may plead his Conviction, and his being a Clerk and ready to read if the Court would have allowed him.

2. When the Indictment and Conviction of Manslaughter and Appeal are removed into the King's Bench, that Court is bound, ex Officio, to call the party to Judgment, and if he pray his Clergy, to allow it to him, and order him to be burnt in the hand.

3. When at the same Sessions or Assizes there is an Indictment and an Appeal depending, it is most just to proceed upon the Appeal, if the Prosecutor desires it, and the Court in Justice is obliged thereunto; because the Stat. 3 H. 7. doth not forbid it, for the words are, That there shall be no tarrying for the Appeal; but if the Appeal be ready, it ought to have the preference: Yet if the Court should proceed to try the Prisoner upon the Indictment, before he be tried upon the Appeal, and he be convicted of Manslaughter, and hath his Clergy, it will be a good Bar to the Appeal; for there may be a just cause for the Court to prefer the Indictment to the Appeal; as, If the Court shall find that there is like to be a faint or a covinous Prosecution of the Appeal, in order to acquit the party; for the Interest of the Crown, and the sake of Publick Justice, the Court ought to try the Prisoner upon the Indictment rather than upon the Appeal, for otherwise the Acquittal upon a faint Prosecution will conclude the King.

4. If upon an Indictment of Murder the party is convicted of Manslaughter, and immediately after, at the same Gaol-delivery, the Wife or Heir of the deceased

ceased shall put in an Appeal, it is most just for the Court to call the Convict to Judgment upon the Indictment, and to allow him his Clergy, before he be put to answer to the Appeal, and then he may plead the Conviction and Clergy in Bar of the Appeal; for tho' it be the same Sessions, and the Appeal hath relation to the first day of the Sessions as well as the Indictment, yet there being a Record of a Proceeding upon the Indictment, it is pleadable in Bar, and may be averred to be the same day before the Appeal commenced; or if the Appeal be commenced before the Trial, if it appears to the Court the Conviction was before Plea pleaded to the Appeal, it is sufficient; For, suppose a Man is indicted of Murder, and tried, and convicted of Manslaughter, or acquitted, and at the same Sessions or Assizes there is a Coroners Inquest, he may plead his former Acquittal or Conviction in Bar of the other; Tho' the Course now used to prevent that Trouble, is to charge the Jury with both Inquisitions at the same time, yet anciently it was otherwise; And if the Court will not allow the Convict of Manslaughter his Clergy, he may insist upon it before he answers to the Appeal.

*Note,* These Reasons were not solemnly delivered in Court, but afterwards were put in order and form by the Chief Justice.

**Term.**

# Term. Pasch.

13 W. 3.

## *Rex versus Plummer.*

Coram Rege inter placita Coronæ Rot. 25.

**P**lummer the Prisoner was indicted at the Assizes held for the County of Kent, 29th. of July, 12 Will. 3. The Indictment sets forth that John Glover, and Benjamin Plummer the Prisoner, and others 13 March 12 Wil. 3. did of Malice forethought make an Assault upon John Harding, and that John Glover having a certain Fuzee in his hand charged with Gunpowder and Bullet, did feloniously, voluntarily and of his Malice forethought discharge the same against the said John Harding, and thereby gave him a mortal Wound of which he instantly died. And that Benjamin Plummer the Prisoner and others of their Malice forethought, did aid, abet and assist the said John Glover in committing the Murder aforesaid. Benjamin Plummer pleaded Not guilty, and the Jury did find this Special Verdict, viz.

That Joseph Beverton was duly appointed to seize and apprehend all such Wool of the growth of this Kingdom, that should be carried to be transported into Parts beyond the Seas, and also all such Persons as should carry the Wool in order to be transported. And that Benjamin Plummer, John Harding, and  
 f f others



others whose Names are unknown, to the number of eight Persons, the said 13 of March about 12 of the Clock at night, about 7 Miles from the Sea, did load 3 Horses with Eight hundred pounds of Wool of the County of England, in order to Transport it into France. And Joseph Beverton having notice thereof, came with divers other Persons to his assistance, to a certain Lane about 7 Miles distant from the Sea, in order to stop and seize the Wool so intended to be transported, and placed themselves in divers places about the Lane; and Joseph Beverton with his Company hearing the 3 Horses laden with Wool, pronounced a Watch Word agreed on between him and his assistants; and thereupon all of them used their utmost endeavour to seize the Wool, whereupon one of the eight Persons in company with Benjamin Plummer, whose name is unknown, did shoot off the Fuzee, and thereby did kill the said John Harding, being one of the eight Persons, and a Partner with them in that design of transporting the Wool, of which Wound he died.

The question is upon this Special Verdict, Whether Benjamin Plummer be guilty of the Murder as charged in the Indictment, or so much as of the Death of John Harding.

To put the Case in as few words as may be, so as to bring it to a point, it is no more than this. Eight Persons had loaded a quantity of Wool to carry it to be transported; of which the King's Officers having intelligence, did in the night-time as they were carrying the Wool, meet to oppose, and to apprehend them, and they met in a Lane, and upon a Watch Word given by the King's Officers, one of the eight Persons shot off a Fuzee, and killed another of the eight Persons, Whether the others of the eight (besides him that shot off the Gun) be guilty of the Murder of the Person slain?

Upon

Upon this question all the Judges have been consulted, And we are all of Opinion, that Benjamin Plummer is not guilty of the Murder of John Harding. The reasons of the Judgment were given by the Chief Justice.

1. It doth not appear by the finding of this Special Verdict, that Glover or the Person unknown that shot off the Gun, did discharge it against any of the King's Officers, but it might be for ought appears for another purpose; though upon the particular circumstances in the Special Verdict, there is an Evidence that the Gun was discharged against the King's Officers, and so it might reasonably be intended, considering they were all armed, and in prosecution of an unlawful act in the night, which they designed to justify and maintain by force: especially when the Gun was shot off upon the Watch Word given, the Kings Officers were endeavouring to Seize the Wool; The Jury thereupon might well have found that the Fuzee was discharged against the King's Officers; but since they have not found that matter, We are confined to what they have found positively, and are not to judge the Law upon evidence of a Fact, but upon the Fact as it is found.

Therefore it is fit to consider in this case 1. What crime it is in the Party that shot off the Gun that killed Harding.

2. How far the rest of his Company that were with him shall be concerned in the guilt of it.

1. He was upon an unlawful design, and if he had in pursuance thereof discharged the Fuzee against any of the King's Officers that came to resist him in the prosecution of that design, and by accident had killed one of his own accomplices, it would have been Murder in him. As if a Man out of malice to A. shoots at him to kill him, but misses him and kills B. it is no less a Murder than if he had killed the Person intended. Dyer 128. Crompt. 101. Plowden's Com.

Com. 474. Saunder's Case, 9 Rep. 91. Agnes Gores's Case.

But 2. It not appearing that he discharged his Fuzee against the King's Officer, It may be that he discharged it either out of some provocation from Harding, or willfully out of some precedent Malice against him.

1. It seems to me hard upon a Special Verdict to construe that the Fuzee went off by accident, but it must be understood to be voluntary; though even in an Indictment for Manslaughter it is requisite that it should be averr'd that he discharged it voluntarily; but in a Verdict it need not be so alleged, but the saying he did it must be understood to be with, and not against his will; for where any one upon any killing of a Man is to be discharged by an involuntary killing, it must be so found, without which it must be understood to be voluntary; for a Man being a free Agent, if he be found to do any Act, it must be supposed to be with his will, unless it be specially, and particularly found to be against his will. Therefore when a Man is indicted for a voluntary killing, if he did kill the Man by misadventure, the special Circumstances of the Case must be found, that it may appear to the Court to be by accident.

2. But in the next place, suppose that he that shot off the Fuzee did it out of Malice premeditated against the Person slain, whereby it would be Murder in him. Then the question will be, whether the rest of his Accomplices shall be adjudged to be principals to him, as Aiders, Abettors or Assistants to that Murder. And we all held that they would not be principals. For though they are all engaged upon an unlawful Act, and while they were actually in it, this Murder is committed by one of the Company so engaged, yet it does not appear to be done in prosecution of that unlawful Act, but it may be upon another account, and those who are in the unlawful Act, not knowing of the design of him that killed the



the other his Companion cannot be Guilty of it. This notion that hath been received, that if divers Persons be engaged in an unlawful Act, and one of them kills another, it shall be Murder in all the rest; is very true; but it must be admitted with several qualifications. First, The Abettor must know of the malicious Design of the Party killing; as for the purpose A. and B. having malice engage in a Duel, C. a Stranger of a sudden takes part with A. who kills B. It's but Manslaughter in C. because he knew not of the Malice, though it be Murder in A. 14 Jac. Sir Ferdinando Cary's Case, Plo. Crompt. 101. Crompt. 23.

If divers Men lie in wait to beat a particular Person and one of them while they are in prosecution of that unlawful Design, out of Malice he had to another of his Companions finding an opportunity kills him, the rest are not concerned in the guilt of the Fact.

At the Sessions at the Old-Baily, December 1664. The Case upon the Evidence was, That the Secretary of State made a Warrant to apprehend divers suspected Persons, which was directed to a Messenger, who having notice that they were in an House, desired several Soldiers to assist him in the apprehending of them, but in the doing thereof they broke open the Doors, and some of the Soldiers stole some Goods. It was held that the Warrant then produced was not sufficient to break open the Doors of the House without a Civil Officer. Secondly, Though the breaking open the Door was an unlawful Act, of which all were guilty; yet was it Felony only in those that stole the Goods, or knew of the design of stealing, and consented to it; but not in the others that were concerned in breaking open the Doors: No more in this case can the rest of the Company be said to be guilty of the killing of Harding, unless they knew of the Person's design to kill him.

2. The killing must be in pursuance of that unlawful Act, and not Collateral to it. As for the purpose; If divers come to hunt in a Park, and the Keeper

commands them to stand, and resists them; if one of the Company kills the Keeper, it is not only Murder in him, but in all the rest then present, that came upon that design, for it was done in pursuance of the unlawful Act, 2 Roll. 120. Palm. 35. the Case of Wormal and Tristram. Lord Dacre's Case, Moor. 86.

But suppose that they coming into the Park to hunt, before they see the Keeper, there is an accidental Quarrel happens amongst them, and one kills the other, it will not be Murder but Manslaughter; and in the rest that were not concerned in that Quarrel it will not be Felony. So if one kills his Companion upon a former Malice; the others will not be concerned in it, therefore cannot be Abettors because Strangers to the design. And that for ought appears might be this Case, for my Brother Gould that tried this Cause informs us, That there was some reason to believe that he that discharged the Fuzee against the Persons slain, did it upon the account that he conceived that the other had betrayed their design; and no doubt it was Murder in him that shot off the Fuzee, but not in the others unless privy to his purpose, for it was not done in prosecution of that unlawful Act; but if he had shot off his Gun against the King's Officers, and by accident had killed one of his own Party, all the rest of them would have been Abettors and Principals.

Dyer 128. p. 60. This case is put A. and B. are fighting together out of malice premeditated, C. comes to part them, and A. kills C. this is Murder in A. and some said in B. also, but the major number were of a contrary opinion; for though B. was engaged in an unlawful Act as well as A. yet the killing of C. by A. was not in pursuance of, but Collateral to it, but the killing of C. by A. was Murder, because he killed one doing his Duty which was endeavouring to keep the Peace; and would have hindered him from killing B. against whom he had Malice.

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3. There is another qualification of this Rule, That the doing an unlawful Act whereby a Person is slain shall make the killer to be a Murderer, is, That the unlawful Act ought to be deliberate. For if it be sudden, as upon an Affray that suddenly falls out, and the Parties are divided amongst themselves and fall to fighting, and one kills the other it is but Manslaughter. So if upon a sudden Affray the Constable or other Person comes to keep the Peace, and some knowing him to be the Constable or Person coming to keep the Peace shall kill him, It is Murder in him and all that assisted him in the doing of it; but in others that continue the Affray, and knew not that the Constable, or other Person was coming to keep the Peace, it will be no Crime: For first, though the Constable did come to keep the Peace, It is necessary that the Parties engaged in the Tumult have notice that he comes for that purpose, otherwise the killing him will not be Murder, but only Manslaughter in him that kills him, and in consequence no Crime in the Persons that did not know him to be there, and did not contribute towards his death. At the Sessions after Hill Term. 19 Car. 2. Thompson and his Wife were fighting together in the House of Allen Daws, who seeing them fighting came in and endeavoured to part them, thereupon Thompson thrust away Daws, and threw him down upon an Iron in the Chimney which broke one of his Ribs, of which he died; this upon a Special Verdict was held to be only Manslaughter, though the Peace was broke, and the Person slain came only to keep the Peace; and it is the same if he had been Constable. But then it was resolved, that if the Constable or other Person come to keep the Peace be killed, it is necessary that the Person that kills him do know, or be acquainted that he came for that purpose. Therefore he ought to charge them in the King's Name to keep the Peace, for otherwise the Party fighting may think he cometh in aid of the other with whom he is fighting. And Mackally's Case doth not oppose this, but agrees with it in the reason there given, which  
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is in these words, viz. When an Officer or Minister of the King Arrest another in the name of the King, or requires the breakers of the Peace to keep the Peace in the King's Name; If any notwithstanding resist and kill the Officer, it is Murder; But if he he had not notice that it was the Officer, it is only Manslaughter in him that killed; but then by the same reason the others that are in the Affray, which was sudden, did continue in the Affray, but did not resist the Constable, it cannot be Murder or Manslaughter in them, for their act cannot be extended farther than a breach of the Peace.

But suppose the Riot or the Assembly had been deliberate, and they designed doing an unlawful act, in which they are opposed by the Constable or any other Person, and one kills the Person opposing, it is Murder in all, Moor 87. Dyer 128. but more distinctly put in Lamb. 243. George came with divers Persons in a Riotous manner to the House of B. upon the account of seizing some Goods, and using there some angry Speeches, a Kinswoman of them both travelling indifferently between them to appease them, was suddenly stricken in the head with a Stone thrown over the Wall by one of the Servants of George, whereof she afterwards died, and by much the greater opinion of the Judges and King's Council, it was held to be Murder in all the Accomplices; and though she came as a Stranger and was indifferent to all, yet they came with Malice against B. and in pursuance, and in execution of that Riot the Woman was killed.

4. As the unlawful Act ought to be deliberate to make the killing Murder, so it ought to be such an Act as may tend to the hurt of another either, immediately, or by necessary consequence. If Persons are in a Riot, and go with offensive Arms, or with Clubs and Staves, and in that Riot one of the Company kills another, It is Murder in him, and in all the rest that are engaged in the Riot, though but lookers on, Dal. 280. Br. tit. Corone 171. St. Pl. C. 40.  
Hale

Hale 51, 57. But, if such unlawful act doth not tend immediately, or by necessary consequence to the danger of another, tho' Death ensue hereby, it is but Manslaughter.

Shooting at a Deer in another's Park is an unlawful act: If the Arrow glanceth and kills a Man, this is but Manslaughter, which is contrary to 3 Inst. 56. that holds it to be Murder: But Lord Hale 31. saith it is but Manslaughter, and the rest of the Company will be guilty, for they were all Abettors to the unlawful act.

The design of doing any act makes it deliberate; and if the fact be deliberate, tho' no hurt to any person can be foreseen, yet if the intent be felonious, and the fact designed, if committed, would be felony, and in pursuit thereof a person is killed by accident, it will be Murder in him and all his Accomplices. As, for the purpose: Divers persons design to commit a Burglary, and some of them are set to watch in a Lane to hinder any from going to the House to interrupt them, if any comes in their way, and those that are to keep watch kill him, those that are sent to rob the House will be guilty of that Murder, tho' they do not commit the Burglary.

So if two Men have a design to steal a Hen, and one shoots at the Hen for that purpose, and a Man be killed, it is Murder in both, because the design was felonious. So is Lord Coke 56. surely to be understood, with that difference; but without this difference, none of the Books quoted in the Margin, which are 3 Ed. 3. Corone 354. 2 H. 4. 18. 11 H. 7. 23. do warrant that Opinion; nor indeed can I say that I find any to warrant my Opinion, but only the Reason is submitted to the Judgment of those Judges that may at any time hereafter have that Point judicially brought before them.

These things I thought fit to mention, tho' some of them are not such Premises from which the Conclusion

is in these words, viz. When an Officer or Minister of the King Arrest another in the name of the King, or requires the breakers of the Peace to keep the Peace in the King's Name; If any notwithstanding resist and kill the Officer, it is Murder; But if he he had not notice that it was the Officer, it is only Manslaughter in him that killed; but then by the same reason the others that are in the Affray, which was sudden, did continue in the Affray, but did not resist the Constable, it cannot be Murder or Manslaughter in them, for their act cannot be extended farther than a breach of the Peace.

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4. As the unlawful Act ought to be deliberate to make the killing Murder, so it ought to be such an Act as may tend to the hurt of another either, immediately, or by necessary consequence. If Persons are in a Riot, and go with offensive Arms, or with Clubs and Staves, and in that Riot one of the Company kills another, It is Murder in him, and in all the rest that are engaged in the Riot, though but lookers on, Dal. 280. Br. tit. Corone 171. St. Pl. C. 40.

Hale



Hale 51, 57. But if such unlawful act doth not tend immediately, or by necessary consequence to the danger of another, tho' Death ensue hereby, it is but Manslaughter.

Shooting at a Deer in another's Park is an unlawful act: If the Arrow glanceth and kills a Man, this is but Manslaughter, which is contrary to 3 Inst. 56. that holds it to be Murder: But Lord Hale 31. saith it is but Manslaughter, and the rest of the Company will be guilty, for they were all Abettors to the unlawful act.

The design of doing any act makes it deliberate; and if the fact be deliberate, tho' no hurt to any person can be foreseen, yet if the intent be felonious, and the fact designed, if committed, would be felony, and in pursuit thereof a person is killed by accident, it will be Murder in him and all his Accomplices. As for the purpose: Divers persons design to commit a Burglary, and some of them are set to watch in a Lane to hinder any from going to the House to interrupt them, if any comes in their way, and those that are to keep watch kill him, those that are sent to rob the House will be guilty of that Murder, tho' they do not commit the Burglary.

So if two Men have a design to steal a Hen, and one shoots at the Hen for that purpose, and a Man be killed, it is Murder in both, because the design was felonious. So is Lord Coke 56. surely to be understood, with that difference; but without this difference, none of the Books quoted in the Margin, which are 3 Ed. 3. Coronæ 354. 2 H. 4. 18. 11 H. 7. 23. do warrant that Opinion; nor indeed can I say that I find any to warrant my Opinion, but only the Reason is submitted to the Judgment of those Judges that may at any time hereafter have that Point judicially brought before them.

These things I thought fit to mention, tho' some of them are not such Premises from which the Conclusion

relation to this matter in question may be drawn, yet they all tend to illustrate the Matter and Reason that we rely upon, which is, That tho' the person that shot off the Fuzee against the person slain did it maliciously, and so it would be Murder in him, yet the others not knowing of his design against that person, cannot be adjudged to be Aiders and Abettors of that Murder.

Secondly, If it had appeared upon the Overt that the Fuzee had been discharged against the King's Officer, and by accident Harding, one of the Company, had been killed, it would have been Murder in the rest, because it was done in pursuance of that Design, which was deliberate, and in the prosecution whereof Hurt and Mischief might ensue; and their being together is an Evidence that they did intend to maintain their unlawful Design by Force, and that the shooting the Gun was against the Officer: But this matter being only Evidence of it, it ought to have been considered by the Jury, but We as Judges cannot take notice of it.

Term.

# Term. Hill.

5 Anna Regina.

*Regina versus Mawgridge.*

In the Queens Bench.

**A**T the Sessions of the Peace held at Guildhall, London, on the first of July, in the fifth year of the Queen, John Mawgridge of London Gent was indicted, for that on the seventh of June, in the same year, he did feloniously, voluntarily, and of his malice forethought, make an Assault upon William Cope Gent, and with a Sword on the left part of his Breast, near the left Pap, did him strike and pierce, giving him thereby a Mortal Wound, of which he the said William Cope did instantly die. Which Indictment being delivered to the Justices of Gaol-delivery for Newgate, he was arraigned thereupon, and pleaded Not Guilty.

The



The Jury found this Special Verdict:

That *William Cope* was Lieutenant of the Queens Guards in the *Tower*, and the Principal Officer then Commanding there, and was then upon the Guard in the Guard-Room; And that *John Mawgridge* was then and there, by the invitation of Mr. *Cope*, in Company with the said *William Cope*, and with a certain Woman of Mr. *Cope*'s acquaintance, which Woman *Mawgridge* did then affront, and angry words passed between them in the Room, in the presence of Mr. *Cope* and other persons there present, and *Mawgridge* there did threaten the Woman; Mr. *Cope* did thereupon desire *Mawgridge* to forbear such usage of the Woman, saying that he must protect the Woman; Thereupon *Mawgridge* did continue the reproachful Language to the Woman, and demanded Satisfaction of Mr. *Cope*, to the intent to provoke him to fight; Thereupon Mr. *Cope* told him 'twas not a convenient place to give him Satisfaction, but at another time and place he would be ready to give it to him, and in the mean time desired him to be more civil, or to leave the Company; Thereupon *John Mawgridge* rose up, and was going out of the Room; and so going, did suddenly snatch up a Glass-Bottle full of Wine then standing upon the Table, and violently threw it at him the said Mr. *Cope*, and therewith struck him upon the Head, and immediately thereupon, without any intermission, drew his Sword, and thrust him into the left part of his Breast, over the Arm of one *Robert Martin*, notwithstanding the endeavour used by the said *Martin* to hinder *Mawgridge* from killing Mr. *Cope*, and gave Mr. *Cope* the Wound in the Indictment mentioned, whereof he instantly died. But the Jury do farther say, That immediately, in a little space of time, between *Mawgridge*'s drawing his Sword and the giving the Mortal Wound by him, Mr. *Cope* did arise from his Chair where he sat, and took another Bottle that then stood upon the Table, and threw it at *Mawgridge*, which did hit and break his Head; That Mr. *Cope* had no Sword in his hand drawn all the while; and that after *Mawgridge* had thrown the Bottle, Mr. *Cope* spake

spake not. And whether this be Murder or Manslaughter, the Jury pray the Advice of the Court.

A Day being appointed for the Resolution of the Court, and the Marshal required to bring the Prisoner to the Bar, returned he was escaped; which being recorded, the Chief Justice gave the Opinion of the Judges in this manner:

This Record being removed into this Court, the Case hath been argued before all the Judges; and all of us, except my Lord Chief Justice *Trevor*, are of Opinion that *Mawgridge* is guilty of Murder.

This hath been a Case of great expectation.

This distinction between Murder and Manslaughter only, is occasioned by the Statute of 23 H. 8. and other Statutes that took away the Benefit of Clergy from Murder committed by Malice prepensed, which Statutes have been the occasion of many nice Speculations.

The word MURDER is known to be a Term or a Description of Homicide committed in the worst manner, which is no where used but in this Island, and is a word framed by our Saxon Ancestors in the Reign of Canutus upon a particular occasion, which appears by an uncontested Authority, Lamb. 141. In the Laws of Edward the Confessor: *Murdra quidem inventa fuerunt in diebus Canuti Regis, qui post acquisitionem Angliam & pacificatam, rogatu Baronum Angliæ remisit in Daciam exercitum suum.* Thereupon a Law was made, That if any *English*-man should kill any of the *Danes* that he had left behind, if he were apprehended, he should be bound to undergo the Ordeal Trial to clear himself; and if the Murderer were not found within eight days, and after that a month was given, then if he could not be found, the Ville should pay forty six Marks, which if not able to pay, it should be levied upon the Hundred. Bracton 120. agrees with this Account.

Tho' this Law ceased upon the expulsion of the Danes, yet William the Conquerour revived it for the Security of his Normans, as appears by his Laws, after he had confirmed King Edward the Confessor's Laws. And Henry 1. anno primo Regni, afterwards by his Law (as appears in the Addition to Lambert) establishes, That if a Man be found slain, he should be taken to be a *French-man* if it was not proved that he was an *English-man*, and the Country was bound to enquire whether the person slain was an *English-man* or a *French-man*. These Inquisitions were taken before the Coroner, and returned to the Justices in Eyre, and if the Jury found him an *English-man*, then the Country was to be discharged, which Law was called *Englshire*, and the Justices in Eyre were also bound to enquire thereof, until the Statute of 14 E. 3. which, as it is mentioned in Stamford, was abolished.

*Manslayer.*

Whereby a mistake upon the Statute of Marlebridge is rectified, which is cap. 26. Murdrum de cetero non adjudicatur coram Justiciariis, ubi per infortunium adjudicatum est, sed locum habeat Murdrum de interfectis per Feloniam tantum, & non aliter. This was not made upon a supposition that he that killed the person slain by misfortune should be hanged, but only to explain, or rather to take off the Rigor of the Conquerour's Law, that the Country should not be compelled to find out the *Manslaughter*; or if he were found out, he should not undergo the Penalty of that Law. For as the Law stood, or was interpreted before that Statute, if a Man was found to be slain, it was always intended, 1. That he was a *French-man*. 2. That he was killed by an *English-man*. 3. That killing was Murder. 4. If any one was apprehended to be the Murderer, he was to be tried by Fire and Water, tho' he killed him by Misfortune; which was extended beyond Reason and Justice in favour of the Normans: But if an *English-man* was killed by Misfortune, he that killed him was not in danger of Death, because it was not Felony. For, saith Bracton (who wrote the latter-end of H. 3.) fo. 136. He that killed a Man by



by Misfortune, was to be discharged. 5. If the *Malefactor* was not taken, then the Country was to be amerced. But by the Statute of Marlebridge, if it was known that the person slain was a French-man, and was killed by Misfortune, then the Country should not be amerced if the Manslayer was taken; or if he were taken, he should not be put to his Ordeal Trial. This seems to be the true meaning of that Statute.

But, secondly, it will appear to a demonstration, That before that Statute he that killed an English-man per infortunium was never in any danger of Death; for this Statute of Marlebridge was made 52 H. 3. The Statute of Magna Charta was consummate 9 H. 3. and that directs, That every one imprisoned for the Death of a Man, and not thereof indicted, might of Right pursue the Writ *de Odio & Atia*; and if it was found that the person imprisoned killed him *se defendendo*, or *per infortunium*, and not *per feloniam*, then he was to be bailed. Which shews that he was not in danger of Death; for if he had, he would not have been let to Bail, 2 Inst. 24.

*supposes.*

Whereby I have given a true Account of the sense of the word Murder, that it was when (first in the time of Canutus) a Dane, and since (in William the Conquerour) when a French-man was killed; for, as it was then supposed in the time of Canutus, the English-men hated the Danes upon the account of their Nation that had subdued them, and would upon all occasions seek their Destruction, as they did of a considerable number of them in the time of Ethelred, the Saxon King that preceded Canutus next save one; so the Conquerour had the same reason to suspect the safety of his Normans.

After.

Afterwards, as appears by the Confessor's Laws, Lamb. 141. the secret or insidious killing of any other as well as a Foreigner was declared to be Murder. Bracton 120, 134, 135. Murder is thus defined, *Est occulta hominum extraneorum & notorum occisio manu hominum nequiter perpetrata.* With which agrees the other old Books of Britton and Fleta: Only in case of a Foreigner it was penal to the Country; not if a Native.

Next, it may be necessary to shew what was to be understood by Homicide or Manslaughter. Bracton 128. mentions the worst part of it, which is a voluntary Homicide, defined in this manner: *Si quis ex certa scientia & in assultu premeditato, ira, vel odio, vel causa lucri, nequiter & in feloniam, ac contra Pacem Domini Regis aliquem interfecerit:* If one knowingly, and by a premeditated Assault, by Anger or Hatred, or for Lucre sake, should kill another, this was accounted Manslaughter; If it be done clanculo, saith Bracton, it is Murder: That was all the difference there was between the one and the other.

It appears, that since that of Bracton the Notion of Murder is much altered, and comprehends all Homicides, whether privately or publickly committed, if done by Malice prepensed. With this agrees Stam. Pl. Cor. 18. b. At this day (saith he) a Man may define Murder in another manner than it is defined by Bracton, Britton and Fleta: If any one of Malice prepensed doth kill another, be he English-man or Foreigner, if secretly or publickly, that is Murder; This was the definition long before the making of the Statutes of 4 & 21 H. 8. and the other Statutes that took away Clergy. To define Murder, there must be malitia premeditata, as also murdravit: So that if an Indictment be that the party murdravit, and not ex malitia premeditata, it is but Manslaughter, Yel. 204. 2 Cro. 283. 1 Bul. 141. Bradly & Banks. So if it be ex malitia premeditata, omitting murdravit, it is but Manslaughter, Dyer 261. Pl. 26. — 304. Pl. 56. Vide Stat. 10 E. 3. cap. 2. The Parliament

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 2 Inst. 42. Cok. 9. 56. Les Poulters Case, Register *nendo in*  
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ment that Murderers, &c. were encouraged to offend, because Pardons of Manslaughters were granted so easily; the Act therefore prohibits the granting thereof. 13 R. 2. recites the same Mischief and great Damage by Treasons, Murders, &c. because Pardons have been easily granted: Therefore the Act doth provide, That if a Charter for the Death of a Man be alledged before any Justice, in which Charter it is not specified that he of whose Death any such is arraigned was murdered or slain by Await, Assault or Malice prepensed, it shall be enquired whether he was murdered or slain by Assault, Await, or Malice prepensed; and if it be so found the Charter of Pardon shall be disallowed. This is a plain Description of Murder, as it was taken to be according to the common understanding of men.

Ever since the killing of a Man by Assault of Malice prepensed hath been allowed to be Murder, and to comprehend the other two instances. But because that way of killing by Poison did not come under the ancient definition of Bracton, &c. which is said to be manu hominum perpetrata, or of this Statute of 13 R. 2. Therefore by the Statute of 1 E. 6. cap. 12. It was Enacted, That wilful poisoning of any Person should be accounted wilful Murder of Malice prepensed.

One thing more is fit to be observed, That in all Indictments for Murder a Man is not charged positively, that he did Murder the person slain, but that he ex malitia præcogitata, in ipsum insultum fecit, ac cum quodam gladio, he gave him a Wound whereof he died: Et sic ex Malitia præcogitata ipsum Murdravit, so the Murder is charged upon him by way of conclusion, and as a consequence from the antecedent matter that is positively alledged. To come close to a State of the present question, It doth appear that Mawgridge threw the Bottle at Mr. Cope without any provocation given to him; for the difference was between him and the Woman that was there in Company, and his behaviour was so rude and distastful as did induce Captain Cope to desire him to leave

the Room, where he was only a Guest to him, and there by his permission; this Cope might reasonably do, which could be no cause to provoke Mawgridge to make the least Assault upon him: Therefore I shall maintain these three Positions.

1. That in this case there is express Malice by the nature and manner of Mawgridge's throwing the Bottle, and drawing his Sword immediately thereupon.

2. That Mr. Cope's throwing a Bottle at Mawgridge, whereby he was hit and hurt before he gave Mr. Cope the mortal Wound, cannot make any alteration in the offence by reducing it to be of so low a degree as Manslaughter.

3. I shall consider what is such a provocation, as will make the Act of killing to be but a Manslaughter only.

1. Here is express Malice, that appears by the nature of the Action. Some have been led into mistake by not well considering what the Passion of Malice is; they have construed it to be a Rancour of Mind lodged in the Person killing, for some considerable time before the commission of the Fact, which is a mistake arising from the not well distinguishing between Hatred and Malice. Envy, Hatred and Malice are three distinct Passions of the Mind.

1. Envy properly is a repining or being grieved at the happiness and prosperity of another, *Invidus alterius rebus macrescit opimis.*

2. Hatred, which is odium, is as Tully saith, *ira inveterata*, a Rancour fixed and settled in the mind of one towards another, which admits of several Degrees. It may arrive to so high a degree, and may carry a Man so far as to wish the



the hurt of him, though not to perpetrate it himself.

3ly, Malice is a design formed of doing mischief to another; Cum quis data opera male agit, he that designs and useth the means to do ill is malicious, 2 Inst. 42. Odium signifies hatred, Actia malice, because it is eager, sharp and cruel. He that doth a cruel Act voluntarily, doth it of malice prepensed, 3 Inst. 62. By the Statute of 5 Hen. 4. If any one out of malice prepensed, shall cut out the Tongue or put out the Eyes of another, he shall incur the pain of Felony. If one doth such a mischief on a suddain, that is malice prepensed; for saith my Lord Coke, If it be voluntarily, the Law will imply Malice. Therefore when a Man shall without any provocation stab another with a Dagger, or knock out his Brains with a Bottle, this is express Malice, for he designedly and purposely did him the mischief. This is such an Act that is malicious in the nature of the Act itself, if found by a Jury, though it be suddain, and the words *ex malitia præcogitata* are not in the Verdict, 1 Cro. 131. *Halloway's Case*, who was Woodward of Austerly Park: A Boy came there to cut Wood, whom by chance he espying, and the Boy being upon a Tree, he immediately calls to him to descend, which the Boy obeying, Halloway tied him to an Horse's Tail with a Cord that the Boy had, then gave him two Blows, the Horse run away and brake the Boy's Shoulder whereof he died. This was ruled to be Murder by all the Justices and Barons, except Justice Hutton, who only doubted thereof; and that was a stronger case than this, for there was some kind of provocation in the Boy, who was stealing the Wood in the Park, of which Halloway had the care; and it cannot be reasonably thought that he designed more than the chastisement of the Boy, and the Horse running away in that manner was a surprise to Halloway; yet in regard the Boy did not resist him, his tying him to the Horse-tail was an Act of cruelty, the event whereof proving so fatal; It was adjudged

ed to be Malice prepensed, though of a suddain, and in the heat of Passion. This case is reported in Jones 198. Pal. 585. And there held, that the Court could determine it to be Malice prepensed upon the special matter found. Crompton 23. Two playing at Tables fall out in their Game, one upon a suddain kills the other with a Dagger: This was held to be Murder by Bromley at Chester Assizes, 27 Eliz. So in this case, if the Bottle had killed Mr. Cope before he had returned the Bottle upon Mawgride, that would have been Murder without all manner of doubt.

In the second place, I come now to consider whether Mr. Cope's returning a Bottle upon Mawgride before he gave him the mortal Wound with the Sword, shall have any manner of influence upon the Case: I hold not. First, Because Mawgride by his throwing the Bottle hath manifested a malicious design. Secondly, His Sword was drawn immediately to supply the mischief which the Bottle might fall short of. Thirdly, The throwing the Bottle by Captain Cope was justifiable and lawful; and though he had wounded Mawgride, he might have justified it in an Action of Assault and Battery, and therefore cannot be any provocation to Mawgride to stab him with his Sword. That the throwing the Bottle is a demonstration of Malice is not to be controverted; for if upon that violent Act he had killing Mr. Cope it had been Murder. Now it hath been held, That if A. of his Malice prepensed assaults B. to kill him, and B. draws his Sword and attacks A. and pursues him, then A. for his own safety gives back, and retreats to a Wall, B. still pursuing him with his drawn Sword, A. in his defence kills B. This is Murder in A. For A. having Malice against B. and in pursuance thereof endeavouring to kill him is answerable for all the consequences, of which he was the original Cause. It is not reasonable for any Man that is dangerously assaulted, and when he perceives his Life in danger from his Adversary, but to have Liberty for the security

curity of his own Life, to pursue him that maliciously assaulted him; for he that hath manifested that he hath Malice against another is not fit to be trusted with a dangerous Weapon in his Hand, Dalt. 292. Hale 42. And so resolved by all the Judges, 18 Car. 2. when they met at Serjeants-Inn in preparation for my Lord Morley's Trial, Dalton 272. If A. of Malice repented, discharge a Pistol at B. and then runs away, B. pursues him, and A. turns back, and in his own defence kills B. It is Murder. This I hold to be good Law; for A. had a malicious intent against B. and his Retreat after he had discharged his Pistol at B. was not because he repented, but for his own safety.

In a set Duel, there are mutual Passes made between the Combatants, yet if there be original Malice between the Parties, it is not the interchange of Blows will make an alteration, or be any mitigation of the Offence of killing. Therefore I hold, If Mawgridge had thrown the Bottle at Mr. Cope, and Mr. Cope had returned another upon him and hit him, and thereupon Mawgridge had drawn his Sword and killed Mr. Cope, It would have been Murder. Some will say, that there is a difference between the Cases, for that the Assault by the Pistol, and the fighting a Duel was express Malice, but this is only Malice implied. Surely there is no difference, for Malice implied is prepensed, as much as if there had been a proof of Malice, or hatred for some considerable time before the Act; for the Stroke given, or an attempt made by Malice implied, is as dangerous as a Stroke given upon Malice expressed, therefore may be as lawfully resisted. This very Point was also considered by the 12 Judges at Serjeants-Inn, and by them resolved to be Murder upon the occasion of my Lord Morley's Case. When a Man attacks another with a dangerous Weapon without any provocation; That is express Malice from the nature of the Act, which is cruel. The definition of Malice implied is where it



is not express in the nature of the Act; as where a Man kills an Officer that had Authority to Arrest his Person: The Person who kills him in defence of himself from the Arrest is guilty of Murder, because the Malice is implied, for properly and naturally it was not Malice, for his design was only to defend himself from the Arrest.

3. I come now to the third matter proposed, which is to consider what is in Law such a provocation to a Man to commit an Act of violence upon another, whereby he shall deprive him of his Life, so as to extenuate the Fact, and make it to be a Manslaughter only. First, Negatively what is not. Secondly, Positively what is. First, No words of reproach or infamy are sufficient to provoke another to such a degree of Anger as to Strike, or Assault the provoking Party with a Sword, or to throw a Bottle at him, or Strike him with any other Weapon that may kill him; but if the Person provoking be thereby killed, it is Murder.

In the assembly of the Judges, 18 Car. 2. this was a Point positively resolved.

Therefore I am of Opinion, That if two are in Company together, and one shall give the other contumelious Language (as suppose A. and B.) A. that was so provoked, draws his Sword and makes a Pass at B. B. (then having no Weapon drawn) but misses him. Thereupon B. draws his Sword and Passes at A. And there being an interchange of Passes between them, A. kills B. I hold this to be Murder in A. for A's Pass at B. was malicious, and what B. afterwards did was lawful. But if A. who had been so provoked draws his Sword, and then before he Passes, B's Sword is drawn; or A. bids him draw, and B. thereupon drawing, there happen to be mutual Passes: If A. kills B. This will be but Manslaughter, because it was sudden; And A's design was not so absolutely to destroy B.

but

but to Combat with him, whereby he run the hazard of his own Life at the same time. But if time was appointed to Fight (suppose the next day) and accordingly they do Fight ; It is Murder in him that kills the other. But if they go into the field immediately and Fight, then but Manslaughter. Suppose upon provoking Language given by B. to A. A. gives B. a box on the Ear, or a little blow with a Stick, which happens to be so unlucky that it kills B. who might have some Impostume in his Head, or other ailment which proves the Cause of B's Death, this Blow though not justifiable by Law, but is a wrong, yet it may be but Manslaughter, because it doth not appear that he designed such a Mischief.

2. Secondly, As no words are a Provocation, so no affronting Gestures are sufficient, though never so reproachful ; which Point was adjudged, 3 Cro. 779. and Braim in an Appeal of Murder.

There having been a Quarrel between A. and B. And B. was hurt in the Fray ; and about two days after, B. came and made a wry Mouth at A. who thereupon Struck him upon the Calf of the Leg, of which he instantly died. It was Murder in A. for the affronting him in that manner was not any provocation to B. to use that violence to A.

There hath been another Case which I fear hath been the occasion of some mistake in the decision of Questions of this kind, Jones 432. D. William's Case, He being a Welsh-man, upon St. David's Day having a Leek in his Hat, a certain Person pointed to a Jack of Lent that hung up hard by, and said to him look upon your Country-man ; at which D. Williams was much enraged, and took a Hammer that lay upon a Stall hard by, and flung at him, which missed him, but hit another and killed him : He was indicted upon the Statute of Stabbing. Resolved, He was not within that Statute, but Guilty of Manslaughter

ter at Common Law. I concur with that Judgment, that it is not within the Statute of Stabbing, for it is not such a Weapon, or Act that is within that Statute, neither could he be found Guilty of Murder, but only of Manslaughter, for the Indictment was for no more. But if the Indictment had been for Murder, I do think that the Welsh-man ought to have been considered thereof, for the provocation did not amount to that degree, as to excite him designedly to destroy the Person that gave it him.

3. Thirdly, If one Man be trespassing upon another, breaking his Hedges or the like, and the Owner, or his Servant shall upon sight thereof take up an Hedge-stake, and knock him on the head: That will be Murder, because it was a violent Act, beyond the proportion of the provocation, which is sufficiently justified by Halloway's Case, who did not seem to intend so much the destruction of the Young Man that stole the Wood, as that he should endeavour to break his Skull or knock out his Brains, yet using that violent and dangerous Action of tying him to the Horse-tail, rendered him Guilty of Murder.

If a Man shall see another stealing his Wood, he cannot justify beating him, unless it be to hinder him from stealing any more (that is) that notwithstanding he be forbid to take any he doth proceed to take more, and will not part with that which he had taken. But if he desists, and the Owner or Woodward pursues him to beat him so as to kill him, It is Murder.

If a Man goes violently to take another Man's Goods, he may beat him off to rescue his Goods, 9 E. 4. 281. b. 19 Hen. 6. 31. But if a Man hath done a Trespass and is not continuing in it; And he that hath received the Injury shall thereupon beat him to a degree of killing. It is Murder, for it is apparent Malice; for in that case he ought not to strike him, but is a Trespassor for so doing.

4. Fourth.



4. Fourthly, If a Parent or a Master be provoked to a degree of Passion by some miscarriage of the Child or Servant, and the Parent or Master shall proceed to correct the Child or Servant with a moderate Weapon, and shall by chance give him an unluckly Stroke, so as to kill him; That is but a misadventure. But if the Parent or Master shall use an improper Instrument in the Correction; then if he kills the Child or the Servant, It is Murder: And so was it resolved by all the Judges of the King's Bench, with the concurrence of the Lord Chief Justice Bridgman, in a Special Verdict in one Gray's Case found at the Old-Baily 10 Octob. 18 Car. 2. *Vide ante.* and removed into this Court. Gray being a Smith, B. was his Servant; He commanded B. his Servant to mend certain Stamps belonging to his Trade; afterwards he and his Servant being at work at the Anvil, Gray asked his Servant whether he had mended the Stamps, as he had directed him. But B. the Servant having neglected his Duty acknowledged it to his Master, upon which the Master was angry, and told him if he would not serve him, he should serve at Bridewel; to which the Servant replied, That he had as good serve in Bridewel as serve the said Gray; whereupon the said Gray took the Iron-Bar upon which he and his Servant was working, and struck his Servant with it upon the Skull, and thereby brake his Skull, of which the Servant died. This was held to be Murder; yet here was a provocation on a sudden, as sudden a resentment, and as speedy putting it in execution; for though he might correct his Servant both for his neglect and unmannerliness, yet exceeding measure therein, it is malicious. Every one must perceive that this last is a much stronger Case than this at Bar.

¶ m

1. First,

1. First, Gray was working honestly and fairly at his Trade, and justly calling to his Servant for an account of his Business; This miscreant was in the actual violation of all the Rules of Hospitality.

2. Secondly, Gray's Action was right, as to the striking his Servant by way of Correction; but the Error was in the degree, being too violent, and with an improper Weapon. This of Mawgridge was with a resolution to do mischief.

3. Thirdly, He had not the least provocation from Mr. Cope, until after he had made the first and dangerous Assault, and then pursued it with the drawing his Sword to second it, before Mr. Cope returned the other Bottle. But Gray had a provocation by the disappointment his Servant gave him in neglecting his Business, and returning a false Answer.

The like in obstinate and perverse Children, they are a great Grief to Parents, and when found in all Actions, are a great provocation. But if upon such provocation the Parent shall exceed the degree of Moderation, and thereby in chastising kill the Child, It will be Murder. As if a Cudgel in the correction that is used be of a large size, or if a Child be thrown down and stamped upon: So said the Lord Bridgeman and Justice Twilden, and that they ruled it so in their several Circuits.

5. If a Man upon a sudden disappointment by another shall resort violently to that other Man's House to expostulate with him, and with his Sword shall endeavour to force his Entrance, to compel that other to perform his Promise, or otherwise to comply with his desire; And the Owner shall set himself in opposition to him, and he shall pass at him, and kill the Owner of the House, It is Murder, 2 Roll. Rep. 460. Clement against Sir Charles Blunt, In an Appeal

**Appeal of Murder.** The Case was, that Clement had promised a Dog to Sir Charles Blunt; and being requested accordingly to deliver him, refused, and beat the Dog home to his House: At which Sir Charles Blunt fetched his Sword, and came to Clement's House for the Dog. Clement stood at the Door, and resisted his Entry. Blunt thereupon kills Clement. The Jury were merciful, and found this Fact in Sir Charles Blunt, to be but Manslaughter. Dodderidge was clearly of Opinion it was Murder. But the Lord Chief Justice was a little tender in his direction to the Jury. But Rolls makes this remark, that it was not insisted upon by the Appellant's Council, that Clement was in the defence of his House, and that Blunt attacked Clement to force in: It was without all question Murder, though of a sudden heat, for there was no Assault made by Clement upon him nor on any of his Friends, but all the violence and force was on Sir Charles Blunt's side.

Having in these particulars shewn what is not a provocation sufficient to alleviate the act of killing, so as to reduce it to be but a bare homicide, I will now secondly give some particular Rules, such as are supported by Authority and general consent, and shew what are always allowed to be sufficient provocations.

1. First, If one Man upon angry words shall make an Assault upon another, either by pulling him by the Nose, or striking upon the Fore-head, and he that is so assaulted shall draw his Sword, and immediately run the other through, that is but Manslaughter: for the Peace is broken by the Person killed, and with an indignity to him that received the Assault. Besides, he that was so affronted might reasonably apprehend, that he that treated him in that manner might have some further design upon him.

There



There is a Case in Stiles 467. Buckner's Case, Buckner was indebted, and B. and C. came to his Chamber upon the account of his Creditor to demand the Money, B. took a Sword that hung up, and was in the Scabbard, and stood at the Door with it in his hand undrawn, to keep the Debtor in until they could send for a Bailiff to Arrest him; thereupon the Debtor took out a Dagger which he had in his Pocket and stabbed B. This was a Special Verdict and adjudged only Manslaughter, for the Debtor was insulted, and imprisoned injuriously without any Process of Law, and though within the words of the Statute of Stabbing, yet not within the reason of it.

2. Secondly, If a Man's Friend be assaulted by another, or engaged in a Quarrel that comes to Blows, and he in the vindication of his Friend, shall on a sudden take up a mischievous Instrument and kill his Friend's Adversary, that is but Manslaughter; so was the Case, 12 Rep. 87. If two be fighting together, and a Friend of the one takes up a Bowl on a sudden, and with it break the Skull of his Friend's Adversary, of which he died, that is no more than Manslaughter. So it is, if two be fighting a Duel, though upon Malice pre-pensed; And one comes and takes part with him, that he thinks may have the disadvantage in the Combat, or it may be that he is most affected to, not knowing of the Malice, that is but Manslaughter, Pl. Com. 101. John Vaughan and Salisbury.

3. Thirdly, If a Man perceives another by force to be injuriously treated, pressed, and restrained of his Liberty, though the Person abused doth not complain, or call for Aid or Assistance; and others out of Compassion shall come to his Rescue, and kill any of those that shall so restrain him, that is Manslaughter, 18 Car. 2. adjudged in this Court upon a Special Verdict found at the Old-Baily, in the

Vide ante.  
p. 59.

the Case of one Hugert, 18 Car. 2. A. and others in the time of the Dutch War without any Warrant impressed B. to serve the King at Sea: B. quietly submitted and went off with the Press-Masters: Hugert and the others pursued them and required a sight of their Warrant; but they shewed a piece of Paper, that was not a sufficient Warrant: Thereupon Hugert with the others drew their Swords, and the Press-Masters theirs, and so there was a Combat, and those who endeavoured to Rescue the pressed Man killed one of the pretended Press-Masters. This was but Manslaughter, for when the Liberty of one Subject is invaded, it affects all the rest: It is a provocation to all People, as being of ill example and pernicious Consequence. All the Judges of the King's Bench, viz. Keiling, Twisden, Wyndham and Moreton were of opinion, that it was Murder, because he medled in a matter in which he was not concerned: But the other eight Judges of the other Courts conceived it only Manslaughter, to which the Judges of the King's Bench did conform and gave Judgment accordingly.

4. Fourthly, When a Man is taken in Adultery with another Man's Wife, if the Husband shall Stab the Adulterer, or knock out his Brains, This is bare Manslaughter; for Jealousy is the Rage of a Man, and Adultery is the highest invasion of Property, 1 Vent. 158. Raymond 213. Manning's Case.

If a Thief comes to Rob another, it is lawful to Kill him. And if a Man comes to Rob a Man's Posterity and his Family, yet to Kill him is Manslaughter, so is the Law tho' it may seem hard, that the killing in the one Case should not be as justifiable as the other. 20 Leviticus, 10 ver. If one committeth Adultery with his Neighbour's Wife, even he the Adulterer and the Adulteress shall be put to Death. So that a Man cannot receive a higher

N n

Proba.

**Prodocation.** But this Case bears no proportion with those Cases that have been adjudged to be only Manslaughter, and therefore the Court being so advised both determine that Mawgridge is Guilty of Murder. More might be said upon this occasion; yet this may at present suffice to set the Matter now in question in its true Light, to shew how necessary it is to apply the Law to exterminate such noxious Creatures. Upon this Conviction the Court did direct that Process should be issued against Mawgridge, and so to proceed to Outlawry if he cannot be retaken in the mean time.

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30. But if *A.* yields to the Arrest, and others endeavour to rescue him, and kill the Officer, not Murder in *A.* *Ibid.*
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